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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-886

THE UPJOHN COMPANY and GERARD THOMAS,
Vice President, Secretary and General Counsel,
*Petitioners,*

v.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Upjohn Company and Gerard Thomas pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

### OPINION BELOW

The opinion of the court of appeals (App. A. hereto) is reported at 600 F.2d 1223. The opinion of the United States Magistrate (App. B hereto) is not officially reported but is unofficially reported at 41 AFTR

2d 78-796 and 78-1 U.S.T.C. ¶ 9277. The order of the district court adopting the Magistrate's opinion (App. C hereto) and the Order of the district court enforcing the summons (App. D hereto) are not officially reported.

## JURISDICTION

The opinion of the court of appeals was issued on June 28, 1979. A timely petition for rehearing was denied on September 10, 1979 (App. E hereto) and the mandate of the court of appeals was issued on September 17, 1979 (App. F hereto). This petition is filed within ninety days of the denial of the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between attorneys for a corporation and corporate employees, where the employees made the communications at the direction of their corporate superiors, the subject of the communications is a matter about which the attorneys' advice has been sought by the corporation, and the communications related to the performance by the employees of the duties of their employment.

2. Whether the work product of attorneys prepared in contemplation of possible litigation is protected against involuntary disclosure in response to a summons issued under 26 U.S.C. § 7602 by a special agent of the Criminal Investigation Division of the Internal Revenue Service.

## STATUTES INVOLVED

The pertinent part of §§ 7402, 7602 and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.) is contained in Appendix G.

## STATEMENT OF THE CASE

This case arises from a summons issued by a special agent of the Criminal Investigation Division of the Internal Revenue Service under 26 U.S.C. § 7602. The summons sought production of certain handwritten notes made by attorneys representing The Upjohn Company and responses received by those attorneys to a questionnaire which they prepared and sent principally to the managers of the Company's subsidiaries abroad. Production was refused by the general counsel of the Company on grounds, among others, that the documents demanded are protected against discovery by (i) the attorney-client privilege and (ii) the attorney work-product rule, as it has been defined by *Hickman* v. *Taylor,* 329 U.S. 495 (1947), and Fed. R. Civ. P. 26(b)(3).

The documents sought by the Internal Revenue Service were prepared in the course of an investigation voluntarily instituted by Upjohn after the Company's independent public accountants found evidence that an improper payment might have been made overseas by one of the Company's foreign subsidiaries. Outside counsel was retained to advise the Company and each of its subsidiaries regarding various legal issues arising from such payments, including anticipated litigation. In conjunction with Upjohn's general counsel, the outside attorneys undertook to gather such information as they required to enable them to provide such

legal advice. The documents at issue in this case were all prepared in connection with that undertaking. The documents have remained confidential and have never been disclosed to anyone except counsel for the Company.

Before completion of their investigation, Upjohn's attorneys recommended that the Company make a preliminary report to the Securities and Exchange Commission regarding the questionable payments. Such a report was promptly made both to the SEC and to the Internal Revenue Service. Later, when additional information had been obtained, a more complete report was made by the Company to the SEC and the IRS. As a result of the disclosures, IRS reopened its audit of the Company's 1972 and 1973 consolidated federal income tax returns, and undertook a criminal investigation of the 1972, 1973 and 1974 returns. The summons from which this case arises was issued in conjunction with that investigation by a special agent in the Service's Criminal Investigation Division.

Enforcement of the summons was referred by the district court to a Magistrate, who concluded that application of the attorney-client privilege should be narrowly restricted to communications made to counsel only by members of a corporation's "control group". (App. B at 22a.) The Magistrate adopted the theory of a "control group" from certain earlier cases, in which such a group was generally defined to include only those persons who have a substantial role in formulating and deciding a corporation's responses to legal advice. The Magistrate reasoned that at least some of the employees from whom Upjohn's attorneys had obtained information were not members of such a

"control group." He also held that the Company's reports to the SEC constituted a waiver of any attorney-client privilege. (App. B at 24a.) Finally, the Magistrate concluded that the Service had made a sufficient showing of necessity to overcome the work-product rule. (App. B at 30a.) On the basis of these conclusions, he recommended to the district court that the summons be enforced. The district court did not prepare a separate analysis of the issues, but simply adopted the opinion of the Magistrate in a brief order. (App. C and D.)

The court of appeals recognized that the scope of the attorney-client privilege as applied to corporations is now disputed and uncertain. (App. A at 4a-5a.) It acknowledged that several other courts, "notably the Seventh and Eighth Circuits", have adopted wider and more flexible rules for the application of the privilege than that approved in this case by the district court. (App. A at 4a.) Under the rules adopted by the Seventh and Eighth Circuits, communications made to counsel by subordinate corporate employees are generally privileged if the subject matter of the communications is a matter about which counsel has been requested to provide legal advice and if it involves the performance by the employees of their corporate duties. Nonetheless, the Sixth Circuit rejected the rules adopted by the Seventh and Eighth Circuits, as well as other courts, and aligned itself with the Third Circuit and other courts which have approved the more restrictive "control group" test applied by the Magistrate. (App. A at 5a.)

The court of appeals held that Upjohn had not waived the protection of the attorney-client privilege with respect to the disputed materials, and found that

the Magistrate and district court had misapplied even the narrow "control group" test. With respect to the work-product rule, the court did not hold that the rule had been overcome by a showing of necessity, but instead stated in a brief footnote that the rule is entirely inapplicable to a summons issued by IRS under 26 U.S.C. § 7602. (App. A at 7a n.13.) The court remanded the case for the limited purpose of a determination as to which of the employees from whom Upjohn's attorneys received communications were part of the Company's "control group."

## REASONS FOR GRANTING THE WRIT

This case presents for decision two important questions regarding the scope of application of the attorney-client privilege and the attorney work-product rule. Each of the questions has widespread significance beyond this case. Both issues are the subject of conflicting decisions by the courts of appeals, as well as numerous other federal courts. One of the issues was fully briefed and argued before this Court in the 1970 Term, but an equally divided Court was unable to reach a decision. Prompt and definitive resolution of both issues is fundamental for the orderly administration of justice and to resolve the conflict among the circuits. Unless authoritative guidance is now provided by this Court, important questions of law will remain disputed and uncertain, and counsel will be seriously hampered in their efforts to provide professional advice to corporate clients regarding a broad range of legal issues.

## I.

### Review By This Court Is Required to Establish the Scope of the Attorney-Client Privilege as Applied to Corporations.

The great bulk of business activity in this country is now conducted through corporate enterprises. In connection with their efforts to provide professional assistance to such enterprises, both inside and outside counsel necessarily must rely upon communications of pertinent information from corporate employees, some of whom frequently occupy subordinate corporate positions. It is imperative that counsel and their corporate clients have definitive guidance whether and in what circumstances such communications will remain confidential under the attorney-client privilege. Despite the obvious importance of clear and authoritative standards, however, the scope of application to corporations of the attorney-client privilege is now the subject of diverse and conflicting rules adopted by different courts of appeals and district courts. The result is confusion and uncertainty.

The decisions in this area fall broadly into three groups. The Seventh and Eighth Circuits have each held that the pri ilege is applicable to communications made to counsel by subordinate corporate employees. The standards adopted by the two circuits are not identical, but in general terms each holds that such a communication is privileged if it relates to a matter about which the corporation has sought the attorney's legal advice, if the communication was made in confidence, and if it relates to the performance of the employee's corporate duties. *Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 606 (8th Cir. 1978) (en banc), *rev'g*

*decision of original panel* 572 F.2d 596 (1977); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd by an equally divided court*, 400 U.S. 348 (1971). Variants of this standard, which has been styled the "subject-matter" test, have also been adopted by many other federal courts.[1] These courts have emphasized that any more narrow or less flexible standard undermines the important policies served by the privilege and disregards the size and complexity of modern corporate enterprises.

Still other courts, particularly the Third Circuit, have rejected the subject-matter test and have instead adopted one variant or another of the rule approved by the court of appeals in this case. *E.g., In re Grand Jury Investigation (Sun Company, Inc.)*, 599 F.2d 1224 (3d Cir. 1979).[2] Under the "control group" test that has been adopted in such cases, the privilege is gener-

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[1] Securities and Exchange Commission v. Texas International Airlines, et al., F. Supp. , (D.D.C., No. 79-0126, August 3, 1979); In re Ampicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D. S.C. 1974); Xerox Corp. v. International Business Machines Corp., 64 F.R.D. 367 (S.D.N.Y. 1974); Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976); Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa. 1973); Leve v. General Motors Corp., 43 F.R.D. 508 (S.D.N.Y. 1967).

[2] *See also* Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975); Burlington Industries v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963); City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus denied sub nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) (dicta).

ally applicable to communications made to counsel only by senior corporate officers who "play a substantial role" in deciding and directing the corporation's response to the legal advice given. (App. A at 5a.)

A third group of courts has noted the conflicting standards that have been adopted by the various circuits, but avoided any resolution of the issue.[3] In these districts and circuits, corporate counsel have been left without any definitive guidance as to which, if any, of the conflicting standards will be applicable to the privilege. Finally, confusion has been intensified by the recommendations of commentators, who have urged the adoption of a wide range of standards, including the subject-matter and control group tests, as well as several variations upon and alternatives to those tests.[4]

Review by this Court is essential to resolve the existing confusion and uncertainty. This is not a matter as to which a multiplicity of standards in different dis-

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[3] In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc., 599 F.2d 504 (2d Cir. 1979), *rev'g* 81 F.R.D. 691 (S.D.N.Y. 1979); Mead Data Central, Inc. v. United States Department of Air Force, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977); Perringnon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978); Securities and Exchange Commission v. Canadian Javelin Ltd., 451 F. Supp. 594, 598-99 (D.D.C. 1978); Federal Trade Commission v. Lukens Steel Co., 444 F. Supp. 803, 807 n.4 (D.D.C. 1977); Attorney General of the United States v. Covington & Burling, 430 F. Supp. 1117, 1121 (D.D.C. 1977).

[4] *E.g.*, Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 Harv. L. Rev. 464 (1977); Note, Evidence-Privileged Communications-The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach, 69 Mich. L. Rev. 360 (1970); Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424 (1970); Simon, The Attorney-Client Privilege Applied to Corporations, 65 Yale L. J. 953 (1956).

tricts and circuits can properly be tolerated. The conduct of corporate business activities commonly cuts across the geographic jurisdictions of many federal courts. When counsel seeks to provide legal advice to corporate clients, the district or circuit in which the transactions may become an issue frequently cannot be predicted. In such situations, it is not enough merely to anticipate that one standard for the application of the privilege may be applied by one court, and a conflicting standard by another court.

The existence of competing standards in some courts, and the absence of any defined standard in other courts, means that counsel are without any reliable basis at all upon which to assess the confidentiality of communications made to them by corporate employees. Under the conflicting rules that now exist, the same communications made by the same employees regarding the same transaction may be privileged in one court and subject to disclosure in another court. Without authoritative guidance from this Court, the application of an important legal principle will remain confused and uncertain, and the efforts of counsel to advise corporate clients regarding a wide variety of legal issues will continue to be severely impeded.[5]

Even apart from the perplexing conflict among the circuits with respect to this issue, review of this Court is needed to reverse the narrow and grudging interpre-

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[5] The importance of this issue is illustrated vividly by the fact that nine parties filed motions for leave to file briefs as *amici* when this Court considered the same issue during its 1970 Term, and affirmed Harper & Row Publishers, Inc. v. Decker, *supra*, by an equally divided Court. Among those filing briefs as *amici* were the American Bar Association, the Association of the Bar of the City of New York and New York County Lawyers' Association, and six other state bar associations.

tation of the attorney-client privilege adopted in this case. The privilege is intended to assure the availability of meaningful professional advice by encouraging uninhibited communications with counsel regarding relevant factual and legal matters. C. McCormick, *Evidence* § 96 at 195 (1954). This Court emphasized more than sixty years ago that unless the privilege is adequately protected and guaranteed, there will be a "pracical prohibition upon professional advice and assistance." *United States* v. *Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915). *See also Fisher* v. *United States*, 425 U.S. 391, 403 (1976). The effect of the narrow interpretation of the privilege adopted below is, however, to create precisely such a "practical prohibition" upon advice given to corporate enterprises.

Counsel can provide meaningful professional assistance to clients only if he first receives a full and candid disclosure of all of the information necessary to assess realistically the legal issues involved. Because of the size and complexity of many modern corporations, senior management often has only general and incomplete information regarding transactions about which legal advice is needed. As a result, much of the detailed factual information required by counsel must often be obtained from subordinate corporate employees, most or all of whom fall outside the narrow "control group" defined by the court of appeals.

If the rigid standard adopted below is permitted to prevail, corporate counsel will be confronted with a dilemma from which there can be no satisfactory escape. Counsel either must offer legal advice upon the basis of information that is likely to be seriously incomplete or must seek adequate factual information from less senior corporate employees outside the scope

of the privilege. If counsel elects the latter, he may thereby waive all protection by discussing privileged information with employees beyond the client's "control group". By so doing, counsel may adversely affect the interests of individuals as well as the corporation. Whatever choice counsel might make, the important public policies served by the attorney-client privilege would be defeated.[6]

The dilemma is illustrated clearly by this case. Upjohn's attorneys were required to provide legal advice regarding compliance with securities and tax laws, possible violations of foreign laws, currency restrictions, possible shareholder litigation, and other legal issues and possible litigation arising from questionable payments abroad. The Company's highest management was unable to provide all of the facts needed by counsel to formulate legal advice. As a result, Upjohn's attorneys were compelled to seek the information they required from a limited group of less senior corporate employees, including the managers of the Company's foreign subsidiaries. The persons from whom information was sought are all employees for whose conduct Upjohn may be liable, and whose knowledge may be imputed to it. To hold, as did the court of appeals in this case, that such communications are unprotected by

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[6] Without extended analysis, the court of appeals assumed that adoption of the broader subject-matter test might cause senior corporate managers "purposely to ignore important information." (App. A at 5a). There is no basis for any such assumption. To the contrary, corporate managers with responsibility for deciding major issues of corporate policy can be expected to continue to seek and receive such information as they believe appropriate to formulate such policies. Under any formulation of the privilege, corporate employees of all levels of seniority may be examined regarding their personal knowledge of disputed transactions.

the attorney-client privilege denies corporate enterprises any effective protection of the privilege and severely impedes the right of those enterprises to obtain informed legal advice.[7]

The narrow and rigid standard adopted in this case for application of the privilege also undermines other important public policies. Officials of the SEC, as well as other senior government spokesmen, have in recent years repeatedly emphasized that corporate counsel are expected to perform substantial roles in assuring corporate compliance with federal securities and other laws.[8] Special emphasis has been placed upon counsel's

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[7] Contrary to the assumption of the court of appeals in this case, a narrow interpretation of the scope of the attorney-client privilege is not required to assure full and adequate discovery. Using the generous discovery provisions of federal regulatory statutes and the Federal Rules of Civil Procedure, government investigators and private litigants may thoroughly interrogate corporate employees of every level of seniority regarding their knowledge of corporate conduct. Reasonable application of the privilege would mean only that such investigators and litigants could not seize for themselves the efforts of a corporation's own counsel to ascertain and evaluate the facts relevant to a disputed transaction. The inconvenience to an investigator or litigant of performing his own factual inquiries is clearly outweighed by the important policies served by the privilege. As Justice Jackson emphasized in Hickman v. Taylor, 329 U.S. 495, 516 (1947) (concurring opinion), "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

[8] *E.g.*, The Role of Inside Counsel in Corporate Accountability, Address by Harold M. Williams, Chairman of the Securities and Exchange Commission, before the Seventeenth Annual Corporate Counsel Institute (Oct. 9, 1979), *reprinted in* 196 *Daily Report for Executives* (BNA), October 10, 1979, at B-1; Corporate Accountability, Address by Harold M. Williams, Chairman of the Securities and Exchange Commission, before the Fifth Annual Securities Regulation Institute (Jan. 18, 1978); Address by Stanley

role in preventing and detecting questionable business practices both in the United States and abroad.[9] Grudging application of the privilege inhibits corporate counsel from performing such activities, erodes the public policies which counsel have been instructed to serve, and undermines compliance with federal regulatory statutes.

All of the reasons that caused this Court to grant certiorari in the 1970 Term in *Harper & Row Publishers, Inc.* v. *Decker, supra,* now justify review in this case. The conflict among the circuits has not disappeared but instead has deepened and broadened. The confusion and uncertainty have become more serious and widespread. The continuing absence of authoritative standards for the application of the privilege to corporate clients has resulted in increasingly substantial impediments to the provision of professional advice to those clients. Guidance from this Court is needed to eliminate those impediments, dispel confusion and uncertainty, and resolve the conflict among the circuits.

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Sporkin, Securities and Exchange Commission, before the Stamford, Conn. Area Commerce and Industry Ass'n (Mar. 15, 1977). *See also* Lorne, The Corporate and Securities Adviser, The Public Interest and Professional Ethics, 76 Mich. L. Rev. 423 (1978).

[9] *Id. See also* Speech of Stanley Sporkin, Securities and Exchange Commission, before the New York County Lawyers Ass'n. (April 7, 1976); Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, 67-68 (May 12, 1976). *Compare* SEC Staff Report, The Accounting Profession and the Commission's Oversight Role (July 1, 1978).

## II.

**Review by This Court Is Needed to Resolve Conflicting Decisions Regarding the Application of the Work-Product Rule to an Administrative Summons.**

This case also presents a second and independent legal issue as to which review by this Court is clearly appropriate. As described above, Upjohn has consistently urged that the documents sought by IRS include notes and other materials that are the work product of the Company's counsel, within the meaning of *Hickman* v. *Taylor,* 329 U.S. 495 (1947), and Fed. R. Civ. P. 26 (b)(3). The court of appeals did not hold or even suggest that the materials are not properly characterized as the attorneys' work-product. Nor did it suggest that the rule is overridden in this case by any showing of necessity. Instead, it held in a brief footnote that the work-product rule is entirely inapplicable to an IRS summons issued under 26 U.S.C. § 7602. (App. A at 7a n.13).

The conclusion reached below is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Brown,* 478 F.2d 1038, 1041 (7th Cir. 1973), which held that the work-product rule is applicable in proceedings to enforce an IRS summons. It is also inconsistent with the previous instructions of this Court regarding the significance and scope of application of the work-product rule in *United States* v. *Nobles,* 422 U.S. 225 (1975), and raises substantial constitutional issues under the Fifth and Sixth Amendments. Review by this Court is needed to resolve

the conflict among the circuits,[10] resolve the constitutional issues and restore the proper interpretation of an important legal principle.

The court below did not explain the reasons for its conflicting decision or even refer to the decision of the Seventh Circuit in *Brown*. Of the cases referred to by the court below, only *United States* v. *McKay*, 372 F.2d 174 (5th Cir. 1967), even discussed the issue. In *McKay*, however, the Fifth Circuit merely expressed doubt as to the applicability of the rule in summons enforcement actions and went on to conclude that the appraiser's report at issue there was "... in no sense the work product of the lawyer ...." *Id.* at 177.

Moreover, the doubts expressed in the Fifth Circuit's dictum in *McKay* were premised upon an assumption that no longer has validity. The court assumed that an analogy exists between summons enforcement actions and grand jury investigations, and further that the work-product rule might be inapplicable before a grand jury. It is now settled that the work-product rule is fully applicable to grand jury investigations. *In re Grand Jury Investigation (Sun Company, Inc.), supra; In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc., supra; Velsicol Chemical Corp.* v. *Parsons*, 561 F.2d 671 (7th Cir. 1977); *In re Grand Jury Proceedings (Duffy)*, 473

[10] Even before the decision in this case, Mr. Justice White took notice of the conflicting authorities regarding the application of the work-product rule to a summons issued by IRS. United States v. Nobles, *supra* at 225, 247 n. 6 (1975) (concurring opinion). The decision in this case deepens rather than resolves the conflict among the circuits.

F.2d 840 (8th Cir. 1973); *In re Grand Jury Investigation (Sturgis)*, 412 F.Supp. 943, 946 (E.D. Pa. 1976); *Matter of Rosenbaum*, 401 F. Supp. 807, 808 (S.D. N.Y. 1975); *United States* v. *Mitchell*, 372 F. Supp. 1239, 1245 (S.D.N.Y. 1973); *In re Terkeltoub*, 256 F. Supp. 683, 685 (S.D.N.Y. 1966). This Court expressly noted the numerous cases that have held the work-product rule applicable to grand jury proceedings in *United States* v. *Nobles, supra* at 238 n.12.

Accordingly, the premise of the only relevant authority relied upon by the court below, the dictum of the Fifth Circuit in *McKay*, has now been destroyed. In fact, the analogy perceived by the Fifth Circuit between summons enforcement actions and grand jury proceedings now requires that the result reached below be reversed, and that the work-product rule be held applicable to such enforcement actions. To hold otherwise, as the court below has done, attributes to the Commissioner of Internal Revenue investigative powers under Section 7602 far broader than those now afforded grand juries. In light of the virtually "unfettered" investigative powers otherwise permitted to grand juries,[11] no policy or other reasons can justify such an anomalous result.

Moreover, the decision reached below is contrary to the principles for application of the work-product rule announced by this Court in *United States* v. *Nobles, supra*. The Court made clear in *Nobles* that the public policies served by the work-product doctrine have

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[11] *E.g.*, United States v. Thompson, 251 U.S. 407, 413-15 (1920); In re Terkeltoub, *supra* at 684.

fundamental importance in criminal as well as civil litigation. The Court emphasized that:

> Although the work product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case. 422 U.S. at 238 (footnote omitted).

This case shows vividly the necessity of the Court's instructions. The summons here was issued by a special agent in the Service's Criminal Investigation Division, as one of the preliminary steps that may lead to criminal prosecution. In such a situation, there are compelling reasons of policy to permit the taxpayer to consult freely with counsel and to encourage counsel to explore thoroughly all of the client's possible defenses. An unnecessary and unrestricted intrusion into counsel's work product by IRS' investigators chills the attorney's performance of his professional responsibilities and inhibits the preparation of defenses to a possible criminal prosecution. The decision below repudiates the "even more vital" role of the work-product rule in connection with criminal prosecutions. *Id.*

Denial of the protection of the work-product rule in connection with criminal investigations by IRS also raises serious constitutional issues under the Fifth and Sixth Amendments. Counsel's work in investigating and preparing defenses to possible criminal charges is "a vital center in the administration of criminal justice." *In re Terkeltoub, supra* at 684. To protect and assure the privacy essential for those preparations, gov-

ernment investigators are, for example, forbidden to eavesdrop or to plant agents to hear the defense's consultations. *E.g., Coplon* v. *United States,* 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952). Even without a showing of actual prejudice, any such intrusion denies effective assistance of counsel, contrary to the requirements of the Fifth and Sixth Amendments. *Caldwell* v. *United States,* 205 F.2d 879, 881 (D.C. Cir. 1953), *cert. denied,* 349 U.S. 930 (1955). In these and other cases, it has repeatedly been emphasized that an accused "does not enjoy the effective aid of counsel if he is denied the right of private consultation with him." *Coplon* v. *United States, supra* at 757.

The intrusion permitted in this case into the confidentiality of the efforts of Upjohn's counsel is not less serious because it was not surreptitious. Constitutional protection would be a "thin illusion" if the Government could "have for the asking" what it has in other instances sought "by less genteel means." *In re Terkeltoub, supra* at 685. Whatever the method employed, any invasion of the privacy of counsel's work in investigating and preparing defenses to criminal charges threatens fundamental constitutional policies. This case affords the Court an important opportunity to define the scope of application of the Fifth and Sixth Amendments in connection with criminal investigations.

The work-product rule is designed to serve longstanding public policies with their roots in constitutional requirements. The narrow scope of application given to the rule by the Court of Appeals in this case erodes and threatens those important policies. Review by this Court is needed to resolve the conflict among the circuits, to resolve substantial constitutional issues, and to vindicate those policies.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

APPENDIX A

No. 78-1277

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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|---|---|
| UNITED STATES OF AMERICA and DAVID E. NOWAK, IRS, *Petitioners-Appellees,* v. THE UPJOHN COMPANY and GERARD THOMAS in his official capacity, *Respondents-Appellants.* | ON APPEAL from the United States District Court for the Western District of Michigan. |

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Decided and Filed June 28, 1979.

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Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. The principal question on appeal is whether this Circuit should adopt the "control group" or the broader "subject matter" test as the standard for measuring the scope of the attorney-client privilege in the corporate context. Appellants, Upjohn Company and its in-house General Counsel, appeal from the District Court's order enforcing under 26 U.S.C. §§ 7402(b), 7604(a) (1976) an IRS summons for documents. The General Counsel refused to produce the documents on the grounds that they are protected by company's attorney-client privilege and by the work-product doctrine. District Judge Fox rejected these arguments and enforced the summons. We adopt the "control group" test, affirm in part, reverse in part and remand.

While auditing Upjohn's 1972-73 consolidated federal income tax returns, the IRS learned that since January 1, 1971, Upjohn and its subsidiaries had made payments of approximately $4,400,000 to officials of many of the 136 foreign countries in which Upjohn does business. The company had directed its in-house counsel, along with outside counsel, to conduct an internal investigation of these payments. At the request of Upjohn's top management, officers and employees of the company were urged to respond to counsel's questions candidly and confidentially. The responses were recorded in answers to written questionnaires and in counsel's notes and memoranda describing oral interviews. These are the documents the IRS seeks to obtain in the instant proceeding.

The internal investigation was prompted, at least in part, by Upjohn's concern that the payments had not been reported properly to the Securities and Exchange Commission. The company filed two reports with the SEC disclosing some, but not all, of the details of the payments. The disclosures were voluntary in the hope of lenient treatment by the SEC. These reports to the SEC were made available to the IRS, which then commenced the instant investigation.

The company provided the IRS with details of $700,000 worth of the payments which it conceded might affect its federal income tax liability. The company furnished the IRS considerably less detailed information regarding the other $3,700,000 of questionable payments because the company claims that these payments do not affect its tax liability. Although the company made its employees available for questioning by the IRS, the company refused to permit questions about the $3,700,000 of questionable payments. The IRS claims that the company's limited disclosure has been inadequate to permit an independent evaluation of the possible tax implications of the payments. Accordingly, the IRS summoned from company counsel the documents generated in the course of the internal investigation and now seeks enforcement.

Upjohn claims that the communications to counsel made by all of its employees, including regular and middle management employees as well as top management, are privileged as confidential communications between client and attorney.[1] To the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice, we disagree for the simple reason that the communications were not the "client's."

The attorney-client privilege, as it exists today, is based on two related principles. The first is that it is an intrinsic part and a necessary incident of the attorney-client relationship. The legal profession has an intimate relationship with its clients and an important role in the administration of our system of justice. Privacy is the necessary context of the relationship between the individual and his lawyer. As stated by Dean McCormick:

> Our adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosure regarding professional business. Loyalty and sentiment are silken threads, but they are hard to break.[2]

The second principle is that the privilege "encourage[s] clients to make full disclosure to their attorneys."[3] This policy of

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[1] *See* VIII J. WIGMORE, EVIDENCE, § 2292 at 558 (McNaughton Rev. 1940):

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

[2] McCORMICK, EVIDENCE § 87 at 176 (2d ed. 1972).

[3] Fisher v. United States, 425 U.S. 391, 403 (1976).

promoting full disclosure to counsel serves to implement the notion inherent in the first principle, that finding the truth and achieving justice in an adversary system are best served by fully-informed advocates loyal to their client's interests.

The application of the privilege to corporate "clients" poses a somewhat different problem. Since corporations are inanimate, artificial entities, the attorney-client relationship is conceptually more difficult, and its underlying principles are less obvious. As clients, corporations can communicate to attorneys only through agents. Moreover, corporations, unlike individuals, are organized in such a way that responsibilities, and the information needed to fulfill the responsibilities, are delegated and compartmentalized. Thus, marketing officials have knowledge and duties related only to selling, while plant supervisors have knowledge and duties related only to production. It is only the senior management, guiding and integrating the several operations, which can be said to possess an identity analogous to the corporation as a whole.

Courts have generally recognized that the attorney-client privilege applies to corporations so long as the attorney-client relationship was initiated and pursued by the company's management.[4] Any communication made by top management to the corporation's attorney, which otherwise meets the requirements of the attorney-client privilege, is protected from disclosure.

The difficulty arises when, after the attorney-client relationship has been established by the top management, communications are made to counsel by subordinate corporate agents and employees. Some courts, notably the Seventh and Eighth Circuits, have adopted the position that such communications are privileged if certain conditions are met. The specification of the conditions varies, but the sum and substance are similar: If the agent is in possession of information acquired in the ordinary course of business relating to the subject matter

[4] *E.g.*, Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968).

of his employment, and the information is communicated confidentially to corporate counsel to assist him in giving legal advice to the corporation, then the communication is privileged.[5] Under this "subject-matter" approach, the privilege does not cover communication of pre-existing documents prepared for independent business reasons[6] or communications unrelated to the subject matter of the agent's employment.[7] Other courts have adopted a narrower approach which covers only those communications made by the so-called "control group" of the corporation, namely, those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given.[8] It is our opinion that the "subject matter" approach goes too far, and we align ourselves with the courts that have adopted the "control group" analysis. The "subject matter" test encourages senior managers purposely to ignore important information they have good business reasons to know and use. Corporate counsel should not be the exclusive repository of unpleasant facts. The law should not encourage corporate

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[5] Diversified Industries, Inc. v. Meredith, 574 F.2d 596 (8th Cir. 1977) (*en banc*); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) (*per curiam*), *aff'd without opinion by an equally divided Court*, 400 U.S. 348 (1971).

[6] *See, e.g.*, Diversified Industries, *supra* note 5 at 809.

[7] *Id. Cf.* Hickman v. Taylor, 329 U.S. 495, 508 (1947 (". . . the protective cloak of [the attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.")

[8] In re Grand Jury Investigation, —— F.2d —— (No. 78, 2040, 3d Cir. June 1, 1979); Natta v. Hogan, *supra* note 4; In Grand Jury Subpoena Dated December 19, 1978, —— F. Supp. —— (No. M 11-1978, S.D. N.Y. Feb. 21, 1979), *rev'd on other grounds* —— F.2d —— (No. 79-1136, 2d Cir. May 21, 1979). Virginia Electric & Power Co. v. Sun Shipping and Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975); Burlington Industries v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963); City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa.)., *mandamus denied sub nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied* 372 U.S. 943 (1963). *See also* Mead Data Central, Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977).

managers to shield themselves from information about possibly illegal transactions. Such purposeful ignorance does not serve the interests of moral corporate conduct or the protection of stockholder equity.

In addition, the scope of the attorney-client privilege should be limited to its purpose because the privilege acts as a bar to the discovery of the truth.[9] The "control group" test recognizes that a corporation's decision-makers, like individual clients, must communicate freely and confidentially to counsel. By protecting these communications, the "control group" test promotes consultation with counsel and thereby achieves its objective.[10] At the same time, the "control group" test guards against undue limitation of evidence. The "subject matter" approach enables the corporation's management — via agents — to "communicate" to counsel the details of transactions about which management is only dimly aware and to have these communications protected by the attorney-client privilege. Thus, once management is informed in a general way of transactions posing legal problems, it can order subordinate agents to communicate the full details directly to counsel. Because the "subject matter" test brings these communications within the attorney-client privilege, it tends to encourage this type of indirect communication to counsel. This, in turn, fosters situations in which the *only* record of the full details of a particular transaction is in the hands of corporate counsel and, under the "subject matter" test, undiscoverable. Discovery, then, would have to be directed at the corporate agents who know the details of the transaction rather than at the corporation's management. When the knowledgeable agents are located in several foreign countries, as here, the burden on discovery is severe. We, therefore, decline to accept Up-

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[9] United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir. 1964).

[10] *See generally* Kubak, *The Uneven Application of the Attorney Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

john's argument because of the broad "zone of silence" it would tend to create.[11]

Upjohn argues, however, that some of the communications in this case were made by members of the "control group." This point is well taken. The record indicates that, in the course of their investigation, Upjohn's counsel interviewed a number of senior corporate officers, including the Chairman of the Board, the Vice Chairman, and the President. These senior officers, and possibly others, are in all likelihood members of the "control group" and their communications to counsel should be privileged.[12] Therefore, we remand the case to the District Court to determine which communications sought by the IRS were made by members of the "control group" and to deny enforcement of the summons with respect to these "control group" communications.[13]

Affirmed in part, reversed in part and remanded.

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[11] Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L. J. 953, 955 (1956). We recognize that, historically, individual clients' communications with counsel via agents have been deemed privileged. *E.g.*, In re Aspinwall, 2 F. Cas. No. 591 (S.D. N.Y. 1874). We believe, however, that this principle should be limited to agents who, at the client's request, communicate *facts known to the client*. *See e.g.*, Reid v. Langlois, 41 Eng. Rep. 1408 (1849); *see generally* MORGAN, BASIC PROBLEMS OF EVIDENCE 100-01 (1954); Simon, *The Attorney-Client Privilege*, *supra*, at 963-64.

[12] The corporation's voluntary disclosures to the SEC amount to a waiver of the privilege only with respect to the facts actually disclosed. United States v. Cote, 456 F.2d 142 (8th Cir. 1972); United States v. Judson, 322 F.2d 460, 461 (9th Cir. 1963); Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied* 371 U.S. 951 (1963); IBM v. Sperry Rand Corp., 44 F.R.D. 10 (D. Del. 1968). *See generally* MCCORMICK, EVIDENCE § 93 (2d ed. 1972).

[13] Upjohn's other arguments that the work-product doctrine and principles of relevancy shield it from disclosure are not well founded. The work-product doctrine of *Hickman* v. *Taylor*, *supra* note 7, and FED. R. CIV. P. 26(b)(3) is not applicable to administrative summonses issued under 26 U.S.C. § 7602. The IRS simply must show that the inquiry is relevant to a good faith investigation conducted pursuant to a legitimate purpose, that the information sought is not in the IRS' possession and that proper administrative procedures have been followed. United States v. Powell, 379 U.S. 48, 57-58 (1964). *See also* United States v. Coopers & Lybrand, 550 F.2d

615 (10th Cir. 1977); United States v. Davey, 543 F.2d 996 (2d Cir. 1976); United States v. Matras, 487 F.2d 1271 (8th Cir. 1973); United States v. Theodore, 479 F.2d 749 (4th Cir. 1973); United States v. McKay, 372 F.2d 174 (5th Cir. 1967).

There is no reason why the IRS should be required to take on faith Upjohn's assurances that $3,700,000 in questionable payments had no tax consequences, especially in view of the company's admission that $700,000 in questionable payments did affect its tax returns. The fact that the IRS investigation is focused on the years 1972-74 does not mean that records after 1974 might not shed light on the earlier years' returns. Moreover, the IRS is not precluded from expanding its investigation into 1975 and later years should the facts warrant. The inquiry, therefore, is relevant to a legitimate investigation of Upjohn's tax liability. Upjohn has not argued that the IRS has acted in bad faith, that the proper administrative procedures have not been followed, or that the information sought is already in the hands of the IRS. Accordingly, the IRS is entitled to have its summons enforced as to all non-privileged material.

Portions of the Petition which also appear in the Appendix have been removed to avoid duplication

Portions of the Petition which also appear in the separately printed Appendix which follows have been removed to avoid duplication

## APPENDIX B

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. K77-7 Misc. CA 4

UNITED STATES OF AMERICA and DAVID E. NOWAK, Special Agent, Internal Revenue Service, *Petitioners*

vs.

UPJOHN COMPANY and GERARD THOMAS, Vice President and Secretary, *Respondents*

### Report and Recommendation of Magistrate

[Filed: February 23, 1978]

This is a proceeding to enforce an Internal Revenue Service summons issued on November 23, 1976 by a special agent of the Internal Revenue Service to the Upjohn Company (herein called the Company) and Gerard Thomas, its Vice President and Secretary.

The summons was issued pursuant to section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602, which provides:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> > "(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Following the respondents' refusal to comply with the terms of the summons, a petition to enforce the summons was filed in this court pursuant to sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 7402(b) and 7604(a).[1]

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[1] Section 7402(b) provides:

"(b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Section 7604(a) provides:

"(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

On August 31, 1977, an order to show cause was entered directing the Company and Gerard Thomas to show cause why they should not be compelled to obey the summons. A hearing was scheduled for September 26, 1977, which was adjourned to October 12, 1977 by agreement of counsel. A hearing was held before the undersigned on the adjourned date.

The summons directed the Company and Mr. Thomas to appear before James M. Rogowski, an officer of the Internal Revenue Service, to give testimony relating to the tax liability of the Company for the years 1972, 1973, and 1974, and also to produce for examination the following records of the Company:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.
>
> "The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries."

The Company and Mr. Thomas refused to produce the records referred to in the summons on the ground that the records were shielded from disclosure by the attorney-client privilege or the work product doctrine, and that the standards required for judicial enforcement of the summons had not been met.

*Findings of Fact*

The Company is a multinational corporation engaged in the manufacture and marketing of pharmaceuticals. It does business in approximately 150 foreign countries both through foreign subsidiaries and foreign branches of United States subsidiaries. Its worldwide sales in 1975 were over 890 million dollars (Petitioner Exhibit 3, Tr. 63). The Company files a consolidated federal income tax return with some of its subsidiaries, but some of its foreign subsidiaries or affiliates are not included in that return. (Tr. 11)

Mr. Thomas is a Vice President, Secretary, and General Counsel of the Company. He is also a member of its Board of Directors and serves as an officer of some of the subsidiaries. (Tr. 62, 77)

In January 1976, the Company's outside auditors, in the course of auditing one of the Company's foreign subsidiaries (Upjohn International Inc.), discovered that payments were being made by the foreign subsidiary to government employees, or to third parties believed to be acting as intermediaries for government employees, for the purpose of securing government business. (Petitioner Exhibit 3, Tr. 78-79). The petitioner has referred to these payments as bribes or kickbacks paid directly or indirectly to foreign government employees to influence their action. Mr. Thomas in his testimony described them as "payments made by or on behalf of the Company or its subsidiaries, which were made to third parties or to Government employees under circumstances indicating that they might be for improper purposes." (Tr. 59-60). They will be referred to hereafter as the "questionable payments." From 1971 through 1975 these payments were in excess of four million dollars. (Petitioner Exhibit 4). The fact of such payments was apparently known by certain inside directors and officers associated with the international operations of the Company. (Petitioner Exhibit 3).

The discovery of the questionable payments was reported by the auditors to Mr. Thomas and other individuals in the Company in January 1976. (Tr. 79) Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the Company with respect to the payments. (Tr. 60-61, 79). As a part of the investigation, Mr. Thomas and outside counsel prepared a written questionnaire to be mailed by the Chairman of the Board to 53 foreign general and area managers of the Company. The questionnaire elicited information regarding questionable payments and directed the addressee to return the form to Mr. Thomas. (Tr. 66, Respondents' Exhibits 2 and 3.)

In addition, Mr. Thomas interviewed by telephone or in person all persons to whom a questionnaire had been sent. He and two outside counsel also interviewed other persons who had not been mailed questionnaires. A total of 86 persons were interviewed, some of whom were no longer employees of the Company. (Tr. 64-66, 95-97, Respondents' Exhibit 1). The interviewer made written notes of the interviews. Mr. Thomas described his notes of the interviews as follows:

> "My notes would contain what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere. They were more than just a verbatim report of my conversation with the—a report of my conversation in the interviews." (Tr. 65)

The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel. (Tr. 65-66, 69-70)

Following Mr. Thomas' initial investigation of the questionable payments, the Company, on March 26, 1976, made a preliminary report of such payments to the Securities and Exchange Commission (SEC) on its Form 8-K. This report disclosed, based on Mr. Thomas' questionnaires and interviews, that the Company since January 1, 1971 had made questionable payments totalling $2,710,000 in 22 of the 136 countries served by the Company. The report to the SEC stated that the Company's investigation was still in progress and that further investigation would be furnished when the investigation was concluded. At the time the report was filed Mr. Thomas was aware that other companies were making similar disclosures and that the SEC had indicated a policy of more lenient treatment of corporations which voluntarily disclosed the type of payments here involved. (Petitioner Exhibit 3, Tr. 81-84). At the time of the disclosure to the SEC, the Company agreed to furnish the SEC with any additional data it might request with respect to the questionable payments. (Tr. 103-104)

On July 26, 1976, the Company filed with the SEC an amendment to its Form 8-K, in which it reported that responses, oral or written, had been received to all questionnaires, that additional interviews had been conducted, and that the total of questionable payments was in excess of four million dollars. (Petitioner Exhibit 4, Tr. 84)

Contemporaneously with the filing of the SEC Form 8-K in March 1976 and the amendment of Form 8-K in July 1976, the Company sent copies of those forms to the Internal Revenue Service. (Tr. 69, 84).

Prior to the filing of the 8-K report with the SEC in March 1976, the IRS had been conducting an audit of the

Company's 1972 and 1973 consolidated federal income tax returns. That audit had almost been concluded when the IRS received a copy of the SEC 8-K report (Petitioner Exhibit 1). As a result the audit was not closed. The matter was referred to the Revenue Service's Intelligence Division, which, in a joint investigation with Revenue Agents, undertook an investigation for the years 1972, 1973, and 1974. (Tr. 29, 36-38)

The Company has furnished two schedules to IRS regarding the questionable payments. One schedule is entitled "Summary of Company Payments By Year (Companies Listed Are Those Companies with U. S. Tax Implications Only)." The schedule purports to list the date, the amount, the company making the payment, and the country in which the payment was made from 1971 to early 1976. The Company listed on this schedule only those payments which it believed had an effect on its consolidated federal income tax returns. The payments shown total approximately $700,000. (Tr. 29-33)

The second schedule is less detailed and purports to be a country-by-country summary of payments made in connection with the Company's foreign operations which the Company claims do not affect its consolidated federal income tax returns. These payments total approximately $3,700,000. (Tr. 33-34).[2] The Company also furnished IRS with source documentation underlying the schedules, such as cancelled checks, vouchers, invoices, advices, etc., but the IRS cliams it has not been furnished with sufficient data to enable it to determine whether there are more questionable payments than those shown in the schedules and whether the persons shown as ultimate recipients are in fact such. (Tr. 19-21, 33-35)

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[2] The schedules were not introduced as exhibits but copies were furnished to me for my *in camera* inspection. It is not clear from the record whether these are the same schedules which the Company furnished to IRS, but for present purposes I am assuming that they are the same.

The Company has no objection to inteviews and has permitted interviews by the IRS of Company employees involved in making questionable payments, but will not permit questions as to transactions which the Company has determined do not affect its consolidated federal income tax returns. (Tr. 46-48, 66-67). The Company has not agreed to bring any of its employees in foreign countries to the United States for interviews. (Tr. 104-105)

*The Attorney-Client Privilege*

The respondents claim that disclosure of the summoned material is shielded from disclosure by the attorney-client privilege. An oft-quoted definition is the one set forth in *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950):

> "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.* at 358.

Professor Wigmore defines it as follows:

> "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the pro-

tection be waived." 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961).

There is no question that the attorney-client privilege extends to corporations, *Radiant Burners, Inc.* v. *American Gas Association,* 320 F.2d 314 (7th Cir. 1963), and thus may be invoked by the Company here. Nor is there any question that "house counsel," such as Mr. Thomas when acting as a legal advisor to the Company, is within the purview of the attorney-client privilege under the same circumstances as "outside counsel." *Natta* v. *Hogan,* 392 F. 2d 686 (10th Cir. 1968).

As with all privileges, the person claiming the privilege has the burden of establishing all its essential elements. *In re Horowitz,* 482 F.2d 72 (2nd Cir. 1973), cert. den. 414 U.S. 867 (1973). The Sixth Circuit has observed that the privilege is designed to enable a client to confide in his attorney, secure in the assurance that there will be no disclosure, but that the privilege does not envelope everything arising from the existence of an attorney-client relationship. *United States* v. *Goldfarb,* 328 F.2d 280, 282 (6th Cir. 1964):

> "It is to be remembered that the attorney-client privilege is an exception carved from the rule requiring full disclosure, and as an exception should not be extended to accomplish more than its purpose. As Dean Wigmore said in his oft-quoted statement: 'It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.' 8 Wigmore, Evidence § 2291, at 554 (McNaughton rev. 1961). The judicial decisions have echoed this need for a restrictive interpretation and application of the privilege. Prichard v. United States, 181

F.2d 326 (C.A. 6); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass.) *Id.* at 282.

The privilege is at best a difficult one to apply. It becomes even more difficult when, as here, the client is a corporation. This stems from the fact that a corporation, being an artificial legal entity, can only act through its agents or employees. Since the attorney-client privilege applies only to communications by or to a "client," and since a corporation can communicate only through its employees or agents, the question arises as to the circumstances under which a communication of an employee or agent of the corporation may be deemed to be the communication of the corporate client enabling the corporation to claim the attorney-client privilege.

The landmark case of *Hickman* v. *Taylor,* 329 U.S. 495 (1947) dealt inferentially with this problem in the context of a partnership. The Court concluded that no attorney-client privilege could be claimed in that case by the defendant partnership for statements taken by the defendant's attorney from the crew members of the defendant's vessel, which was involved in an accident. The Court treated the employee crew members simply as witnesses and outside the scope of the privilege.

The problem was probably first met squarely and discussed in depth in *Philadelphia* v. *Westinghouse Electric Corp.,* 210 F. Supp. 483 (E.D. Pa. 1962), which involved the defendant's claim of privilege with respect to information acquired by its general counsel from an employee in the course of the counsel's investigation of facts relating to a pending indictment of the defendant. The court adopted the so-called "control group" test for determining whether the communication of a corporate employee or agent could qualify as being the communication of the corporate client for the purpose of a corporation's invoking the attorney-client privilege. The court stated:

"Now, in cases where an employee of a corporation in an executive or managerial position communicates a fact relative to pending litigation to a lawyer retained or employed by the corporation, the question frequently arises: When he does so, is the corporation seeking the advice of the attorney? In other words, was he at the time, in contemplation of law, the corporation seeking advice? If not, then he was giving the lawyer information in order that the latter could advise a client other than himself. In such case the employee is merely a witness and I think that Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, settles the question that a statement given by a witness to a lawyer who is collecting information in order to prepare for litigation pending against the lawyer's client is not privileged although it may be within the ambit of the 'work product' principle; and it is very important to keep in mind the fact that the work product principle is not and cannot properly be described as a privilege. Some Courts have confused the situation by calling it a qualified privilege, but it is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case." *Id.* at 485.

The court also stated that the rank in the corporation of the employee making the communication is not a satisfactory guide in determining whether the privilege is applicable because such terms as manager, executive, or officer are not clearly defined terms. *Id.* at 485. The court stated the proper approach as follows:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substan-

> tial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice." *Id.* at 485.

The court went on to conclude that the communications made by the employee were not within the attorney-client privilege, stating:

> "It is obvious that the matter as to which the witnesses in this case made the disclosures was a matter of overwhelming importance to the corporation, and that even a department or division head or an employee on a similar managerial level would hardly be given any substantial role in making that decision. It was a matter which, of course, the corporation knew made it probable that very heavy claims for damages would be asserted against it and a decision of that kind could have been made only by the very highest authority." *Id.* at 485-6.

In essence the court held that if the employee making the communication, of whatever rank he might be, was in a position to control or even to take a substantial part in a decision about any action which the corporation might take upon the resulting advice of the attorney, or if he was an authorized member of a body or group which had that authority, then in effect he was or personified the corporation when making the disclosure, and the privilege would apply, while in all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

The control group test has been followed in many decisions. See, for example, *Natta* v. *Hogan,* 392 F.2d 686 (10th Cir. 1968); *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Dry Dock Co.,* 68 F.R.D. 397 (E.D. Va. 1975); *United States* v. *International Business Machines Corp.,* 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Burlington Industries* v. *Exxon Corporation,* 65 F.R.D. 26 (D. Md. 1974); *Honeywell Inc.* v. *Piper Aircraft Corp.,* 50 F.R.D. 117 (M.D. Pa. 1970); *Congoleum Industries Inc.* v. *G.A.F. Corp,* 49 F.R.D. 82 (E.D. Pa. 1969); *Garrison* v. *General Motors Corp.,* 213 F. Supp. 515 (S.D. Cal. 1963).

I am aware of *Harper & Row Publishers, Inc.* v. *Decker,* 423 F.2d 487 (7th Cir. 1970), affirmed *per curiam* by an equally divided court, 400 U.S. 348 (1971), reh. den., 401 950 (1971), cited in respondents' brief, which held that the control group test is not wholly adequate. The court held that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. It would appear that the *Harper & Row* formula would exclude virtually nothing from its sweep and flies in the face of the well-established principle that the privilege "should be strictly confined with the narrowest possible limits consistent with the logic of its principle." *United States* v. *Goldfarb,* supra.

It would also appear to open the door to the danger envisioned by the Supreme Court in *Hickman* v. *Taylor,* supra:

> "Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect

after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents." 329 U.S. at 506.

In view of the overwhelming acceptance of the control group test, I have concluded that it should be followed in this case.[3] Thus the fact that the persons interviewed by Mr. Thomas were branch managers or area managers is not determinative of whether the privilege is applicable. The important question is whether they were in a position to control or to take a substantial part in a decision about any action the Company might take upon the advice of Mr. Thomas, or whether they were merely giving information to Mr. Thomas to enable him to advise those in the corporation having the authority to act or refrain from acting on his advice. It is apparent from the record that the matter as to which the interviewees made the disclosures to Mr. Thomas was a matter of overwhelming importance to the Company but not one as to which any of the interviewees would be given any substantial role. When Mr. Thomas first heard of the questionable payments, he went first to the Chairman of the Board to discuss the matter. The questionnaire that was sent to the employees went out over the signature of the Chairman of the Board, Mr. Thomas' concern was with the SEC ramifications, the tax consequences, currency regulations, and the like. (Tr. 79-80). These are matters on the highest corporate level and hardly within the domain or authority of the persons interviewed. Clearly, these persons in completing the questionnaires and submitting to interviews were simply giving information to Mr. Thomas to enable him to advise the

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[3] It is speculative as to how much, if any, of the information Mr. Thomas obtained from the Company employees would be protected even under the *Harper & Row* formula, since it requires that the employees' communications deal with subject matter within the duties of their employment. Mr. Thomas testified that the person interviewed may himself have been a participant in the payments or he may have been reporting on what he had learned, through investigation, about the activities of others. (Tr. 93-94)

Board of Directors and its Chairman as to how to handle the securities, tax, and related problems which the questionable payments created. Only the latter had the authority to act in these areas. Thus the disclosures made by the interviewees to Mr. Thomas or the Company's outside counsel do not fall within the attorney-client privilege.

It may also be noted that the attorney-client privilege may be lost or waived by disclosing to others what has earlier been confided to an attorney. See *United States* v. *Cote*, 456 F. 2d 142 (8th Cir. 1972) (filing of amended tax returns which reflected accountant's workpapers to which privilege had attached effectively waived the privilege not only as to the transmitted data but also as to the details underlying that information); *United States* v. *Schoeberlein*, 335 F. Supp. 1048 (D. Md. 1971). (Work papers of accountant-attorney were no longer privileged after being used as a basis for a Federal Communication Commission license application as well as for a tax return); *B & C Trucking Co.* v. *Holmes & Narver, Inc.*, 39 F.R.D. 317 (D. Haw. 1966). (Disclosure of internal communications between contractor and its attorney to Atomic Energy Commission destroyed or waived any attorney-client privilege.) The doctrine of waiver was referred to in *Duplan Corporation* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146 (D. S.C. 1975) as follows:

> "A waiver of the privilege as to all communications ordinarily follows from the voluntary waiver even if made *with limitations* of one or more similar communications. Thus, if a client, through his attorney, voluntarily waives certain communications, but guarded with a specific written or oral assertion at the time of the waiver that it is not its intention to waive the privilege as to the remainder of all similar communications, the privilege, as to the remaining undisclosed communications, is nevertheless waived.
>
> "Plaintiff's argument that waiver requires an intentional relinquishment or abandonment of a known right

has a familiar ring with regard to general contract law, but waiver, as applied to the particular subject of attorney-client privilege, may be made by implication:

> "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that *his privilege shall cease whether he intended that result or not.* 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961." *Id.* at 1162. (Emphasis in original)

In the present case, the Company made disclosures to the SEC with respect to the questionable payments in its 8-K report of March 26, 1976, and its amended 8-K report of July 26, 1976. Furthermore, the Company agreed to furnish the SEC with any additional data it might request with respect to such payments. (Tr. 103-104) Copies of the SEC reports and related data was also furnished to the IRS. Having disclosed some data with respect to questionable payments, it now seeks to hold back other data relating to the same matter. Under the circumstances, the Company should be deemed to have waived the attorney-client privilege with respect to the same matter, if indeed it ever existed. As stated by the court in *Burlington Industries* v. *Exxon Corporation,* supra:

> "Nevertheless, the court is not unmindful of the fact that privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case. 8 Wigmore, Evidence § 2327 (McNaughton Rev. 1961). Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." 65 F.R.D. at 46.

Mindful of the admonition requiring "a restrictive interpretation and application of the privilege," *United States* v. *Goldfarb,* supra, I find that the respondents have not sustained their burden of proving that the summoned material is shielded from disclosure by the attorney-client privilege, and that the privilege is not applicable here.

*The Work Product Doctrine*

The respondents claim that disclosure of the summoned material is also shielded from disclosure by the work product doctrine. This doctrine had its genesis in *Hickman* v. *Taylor,* 329 U.S. 495 (1947). The Court there held that while private memoranda, written statements of witnesses, and mental impressions or personal recollections prepared or formed by an attorney in the course of his legal duties for his own use in prosecuting his client's case and contained in his files or mind fall outside the scope of the attorney-client privilege, and hence are neither protected from discovery on that basis nor protected from disclosure because the subject matter is "privileged" or "irrelevant" as those concepts are used in the federal rules, nevertheless they are protected from discovery as the "work product" of the attorney, in the absence of any showing, of necessity or any indication or claim that denial of discovery would unduly prejudice the preparation of the inquiring party's case or cause him any hardship or injustice.

The respondents argue that counsel's notes of the interviews constitute material squarely covered by the attorney work product doctrine, and that so do the responses to the questionnaires because the information thus obtained is the product of the work of the Company's counsel.[4]

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[4] To the extent that the responses to the questionnaires simply reflect the answers of the employee, they would appear to be no different than the written statement of a witness which records the mental impressions and observations of the witness, rather than

There is, at the outset, a serious question as to whether the work product doctrine is even applicable in a summons enforcement proceeding. In *United States* v. *McKay,* 372 F.2d 174 (5th Cir. 1967), which also involved the enforcement of an Internal Revenue Service summons under 26 USC § 7604(a), the court held that the relevancy of the work product rule to such a proceeding "may well be doubted." The court stated:

> "We think the power of the Commissioner of Internal Revenue to investigate the records and affairs of taxpayers is greater than that of a party in civil litigation. His power has been characterized by this court as an inquisitorial power, analogous to that of the grand jury and one which should be liberally construed. Falsone v. United States, 5 Cir. 1953, 205 F.2d 734, 742 cert. den. 346 U.S. 864, 74 S. Ct. 103, 98 L. Ed. 375. In such context, the criteria of relevancy and materiality have broader connotations than in the context of trial evidence. Schwimmer v. United States, 8 Cir. 1956, 232 F.2d 855, 862, cert. den. 352 U.S. 833, 77 S. Ct. 48, 1 L. Ed. 2d 52. As was said in Bolich v. Rubel, 2 Cir. 1933, 67 F.2d 894, 895, these inquisitorial powers are justified 'because all the facts are in the taxpayer's hands.' Accordingly, the relevancy of the work product privilege enunciated in the *Hickman* case to a proceeding for the enforcement of the Commissioner's summons may well be doubted." *Id.* at 176.

However, even if the work product doctrine is deemed applicable to this type of proceeding, the doctrine is not a privilege, and discovery may still be had upon a showing of "substantial need" and an inability "without undue hardship" to obtain the information by other means. Rule 26(b)

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those of the attorney. In such case, the response would not properly be considered the work product of the attorney. See *Scourtes* v. *Fred W. Albrecht Grocery Co.,* 15 F.R.D. 55, 58 (N.D. Ohio 1953).

(3), Federal Rules of Civil Procedure. *Hickman* v. *Taylor*, supra, 329 U.S. at 511; *Burlington Industries* v. *Exxon Corporation*, supra, 65 F.R.D. at 43. Thus in *United States* v. *Brown*, 478 F.2d 1038 (7th Cir. 1973), the court, although holding that the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue Service summons, nevertheless concluded that a three-page memorandum prepared by an attorney summarizing notes and legal judgments made by the attorney at a meeting involving a discussion of the tax consequences of a client's potential business transaction was not protected from discovery by the attorney's work product doctrine.

The court stated:

> "The Supreme Court has also noted the strong Congressional evidence of intent that the Commissioner of Internal Revenue not be impeded in his investigation of taxpayers:
>
> > 'Section 7601 of the 1954 Code, 26 U.S.C. § 7601, directs the Secretary or his delegate "to the extent he deems it practicable" to cause Treasury Department officers or employees "to proceed .... and inquire after and concerning" all persons "who may be liable to pay any internal revenue tax." The section thus flatly imposes upon the Secretary the duty to canvass and to inquire.' Donaldson v. United States, 400 U.S. 517, 523, 91 S.Ct. 534, 539, 27 L.Ed.2d 580 (1971).
>
> "We think the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons. *The strong public interest as expressed by Congress in enforcement of the Internal Revenue Act may, however, be relevant in considering the degree of necessity which need be shown prior to the enforcement of an order to produce.*" Id. at 1040-41 (Emphasis supplied.)

In the present case, respondents claim that no necessity exists for allowing disclosure of the responses to the questionnaires or to counsel's notes of the interviews because the respondents have already disclosed ample information both to the IRS and SEC, and because the IRS has already interviewed many of the Company employees. However, the fact is that the Company has refused to allow any of its employees to be interviewed as to any transactions which it has determined for itself have no impact on the Company's federal tax return. Nor has it been willing to disclose details of any transactions for which it has reached the same conclusion. (Tr. 46-48, 66-67). Thus, the Company has relegated to itself the determination of what is or is not relevant to the investigation of the Revenue Service. The record demonstrates that the Company has made questionable payments in excess of four million dollars. It concedes that approximately $700,000 of those payments affect its consolidated federal tax return. As to the balance of payments, the Company insists that the Revenue Service must accept the Company's conclusion that those payments have no effect on its tax return. (Tr. 33-35) Special Agent Novak testified that instead of accepting the summary of the Company's investigation at face value, he wishes to obtain additional information, such as verification of the recipients of the payments, and to check whether there may have been payments which were not recorded on the Company's books. (Tr. 14, 51-52) Moreover, its is not inconceivable that a payment which the Company claims has no impact on its domestic tax return may upon investigation disclose the contrary.

The necessity for compelling disclosure in this case is also indicated by the fact that the persons interviewed are beyond the jurisdiction of the court and thus not subject to compulsory process. Even if they were made available

for interviews,[5] it is not unreasonable to expect some hesitancy, if not actual hostility, in answering questions with respect to payments which might have been made in violation of local laws. Moreover, where interviews have in fact been permitted, the scope of the inquiry has been limited to what the Company's counsel deemed appropriate. (Tr. 46-48) In *Hickman* v. *Taylor,* supra, the Court stated that "production [of work product] might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U.S. at 511. Similarly, in *Burlington Industries* v. *Exxon Corporation,* supra, the court stated that the factors to be considered in deciding whether to compel disclosure are "(1) the importance of the information sought and (2) the difficulty the party seeking discovery will face in obtaining substantially equivalent information from other sources if discovery is denied." 65 F.R.D. at 43.

Cf. *Southern Railway Company* v. *Lanham,* 403 F.2d 119, 128 (5th Cir. 1969), reh. den. 408 F.2d 348 (1969) (employees who may be expected to be somewhat reluctant to answer fully questions which might have an adverse effect on their employer); *McDonald* v. *Prowdley,* 38 F.R.D. 1 (W.D. Mich. 1965) (unavailability of witness or difficulty of access to a witness); *Wilson* v. *David,* 21 F.R.D. 217, 221-2 (W.D. Mich. 1957) (witness residing outside the jurisdiction of the court).[6]

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[5] Although the Company has said it will make its employees available for interviews, it has not agreed to bring them to the United States for this purpose. (Tr. 104-105)

[6] These cases involved the disclosure of statements of employees under Rule 34 of the Federal Rules of Civil Procedure upon a showing of "good cause."

I find that the record establishes ample necessity for compelling disclosure of the summoned material in this case, and that the work product doctrine does not shield the material from such disclosure.

*The Standards of Enforcement of the Summons*

The respondents claim than the standards necessary for judicial enforcement of an Internal Revenue summons as set forth in *United States* v. *Powell,* 379 U.S. 48 (1964) were not complied with. In *Powell,* the court stated:

> "He [the Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . ." *Id.* at 57.

The Court also held that the burden of showing an abuse of the court's process is on the taxpayer. *Id.* at 58.

The respondents do not claim that the administrative steps required by the Code have not been followed. They do claim, however, that the first three requirements enumerated in the quotation from *Powell* have not been satisfied.

The claim that the summons was not issued for a legitimate purpose is clearly without merit. Respondents assert that the summons was issued solely for the purpose of a criminal prosecution, but this assertion is not substantiated by the record. On the contrary, the record establishes that no recommendation for prosecution had been made to the Department of Justice. It also established that the investigation was primarily a civil one and that no determination had been made as to whether the Company or anyone else should be prosecuted, although the possibility of criminal violation is always inherent in any such investigation. (Tr.

14-16, 37-38) In this connection, the Supreme Court in *Donaldson* v. *United States*, 400 U.S. 517 (1971) stated:

> "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. The regulations are positive. Treas. Regs. § 301.7602-1(c)(4), 26 CFR § 301.7602-1(c)(4). The underlying statutes are just as authoritative. Section 6659(a)(2) of the Code defines the term 'tax' as used in the Code and, hence, in the authorizing § 7602, to include any addition or penalty. Section 7602 contains no restriction; further, it has its ascertainable roots in the 1939 Code's § 3614 and, also, § 3615(a)-(c), which, by its vey language and by its proximity to § 3616 and § 3654, appears to authorize the use of the summons for investigation into criminal conduct. There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. See *Mathis* v. *United States*, 391 U.S. 1, 4 (1968). To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law. See *United States* v. *Kordel*, 397 U.S. 1, 11 (1970).
>
> "We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution. *Id.* at 535-6.

Nor do I find anything in the record to justify the assertion that the summons was not issued in good faith. At most, the summons might be classified as having a dual purpose, which clearly would not render it improper. In

*United States* v. *Held*, 435 F.2d 1361 (6th Cir. 1970), the court stated:

> "Even if the primary purpose of the summons was to further the criminal tax investigation, we believe the secondary purpose of determining appellant's civil tax liability would support the validity of the summons . . . ."
>
> "It is well settled that a § 7602 summons issued for an authorized purpose is entitled to enforcement even though it may produce evidence of criminal conduct on the part of the taxpayer. (Citations omitted)
>
> "Enforcement of the summons is not precluded by the possibility that it eventually might lead to a criminal prosecution." *Id.* at 1364-5.

See also *United States* v. *Haddad*, 527 F.2d 537 (6th Cir. 1975); *United States* v. *Weingarden*, 473 F.2d 454 (6th Cir. 1973).

Nor is there merit in the respondents' claim that the inquiry is not relevant to its purpose. In this connection, Special Agent Nowak testified:

> "Q. Why do you feel that you should have these documents, if I may add, rather than take the Upjohn Company's assurance as to what the relevance of those documents?
>
> "A. Well, I feel that those files may contain evidence that would indicate that there is in fact a tax implication involved in payments which the Company has alleged have no U.S. tax implication. These files may provide leads or other evidence that would have a relationship to those payments that the Company does admit have a U.S. tax implication.
>
> "I believe that it would—if it seved no other purpose, it would help me corroborate the Company's position

that there is no tax impact, if that is what the facts would show upon my investigation of the files.

"Q. So while it may be a conclusion that the Court has to draw, in your view the summoned documents were, at the time summoned and are today, necessary to your continuing investigation, is that correct.

"A. Yes, sir." (Tr. 14)

Respondents in their brief point to the fact that Agent Nowak used the word "may" in explaining what he was seeking, that is, evidence that "may" indicate tax implications or "may" provide leads to such evidence. It is noted that this is no less than the applicable statute, 26 USC § 7602, requires. The statute authorizes the Secretary to "examine any books, papers, records, or other data which *may* be relevant or material to such inquiry."

The Supreme Court has recognized the strong Congressional intent that the Revenue Service not be hindered in its investigation of taxpayers, and that the applicable statute "flatly imposes upon the Secretary the duty to canvass and to inquire." *Donaldson* v. *United States,* supra, 400 U.S. at 523. The test of relevancy was stated in *Foster* v. *United States,* 265 F.2d 183 (2nd Cir. 1959), cert. den. 360 U.S. 912 (1959), as follows:

"The test, we think, is essentially the same as that for materiality with respect to grand jury investigations. (Citations omitted) It is whether the inspection sought 'might have thrown light upon' the correctness of the taxpayer's returns."

See also *United States* v. *Egenberg,* 443 F.2d 512, 515 (3rd Cir. 1971); *United States* v. *Harrington,* 388 F.2d 520, 523 (2nd Cir. 1968); *United States* v. *Auker,* 325 F. Supp. 857 (S.D. N.Y. 1971).

In *United States* v. *Auker,* supra, the summons sought the production of the taxpayer's corporate minutes for several taxable years. The taxpayer (Standard Oil Company of New Jersey) argued that since not everything in the corporate minutes was relevant, it was not required to disclose all of its minutes. Therefore, it decided it "would make available for inspection all minutes which might have a bearing on the determination of Jersey's income tax liability." Thus, the taxpayer, like the Company here, undertook to decide for itself what was relevant, or more particularly what would affect or have a bearing on its tax liability. In rejecting this position, the court stated:

> "The accountants, to be sure they see what is germane to their task, look at minutes that turn out not to be germane. They do not accept the views of others as to what they ought to examine, and the company does not expect them to do so. This makes sense for them. It makes equally good sense, *mutatis mutandis,* for the agents of the IRS.
>
> "When we turn to the governing precedents, we discover what is not altogether extraordinary—that the dictates of good sense are in line with the law's commands. The cases show that the statutory provision for the examination of papers that '*may* be relevant or material'—properly viewed as a prediction about things yet unseen, not as judgment about materials presented or offered for 'rulings'—has to mean what it quite simply says: that the demand may extend to documents that 'might' throw light upon subjects under legitimate inquiry. . . . The agents of the IRS cannot and they need not guarantee that everything they wish to see *will* be relevant or material to their inquiries any more than Jersey's accountants can do for theirs." 325 F.Supp. at 861-2.

Respondents also complain of the fact that the summons shows on its face that it relates to the tax liability of the

Company for the years 1972, 1973, and 1974; yet the summons seeks information regarding questionable payments "since January 1, 1971." Special Agent Nowak explained the reason for the time span as follows:

> "Q. Mr. Nowak, you have been sworn, of course. Some comment has been made about the years '71 and '75 with respect to this Summons. Would you briefly explain the relevance and necessity for those documents and the other information sought with respect to your investigation, which is currently for '72 through '74?
>
> "A. Well, in relation to 1975, the fact that there has been a Schedule M adjustment indicates that there is an item that the Internal Revenue Service ought to check to make sure the adjustment has been treated properly. And, in addition, the Government's position, the Internal Revenue Service's position has always been clearly stated that while the investigation covered the years 1972 through 1974 we were not precluded in opening up going into the 1975 were we to find indications of possible criminal or civil ramifications in these payments. And in regard—we could also have the option of going back to 1971, if we wanted to. Another possible relevancy for that material, especially 1971, is the possibility of transactions occurring in one year and not being recorded on the books and records of the Company in that year, but for various reasons, through error or otherwise being recorded in another year, so we would have to make sure that transactions were properly reflected in the year that they occurred." (Tr. 51-52)

The limited disclosures which the Company voluntarily made to the SEC and the IRS covered the period "since January 1, 1971." Under the circumstances, it was reasonable for the Revenue Service to request information for a period at least as long as that covered by the Company's disclosures.

Respondents also point to the fact that on November 28, 1977, the Internal Revenue Service issued a Revenue Ruling which, they claim, holds that illegal bribes and kickbacks made by a foreign subsidiary properly reduce the earnings and profits of that subsidiary, and, in effect, do not have an impact on the United States tax return of the parent. Rev. Rul. 77-442, 1977-48 I.R.B. 10. This, of course, does not answer the basic question, whether the respondents can unilaterally decide for themselves whether the questionable payments fall within the ambit of the ruling. Moreover, the Company's own tax expert, David S. Creamer, who is the Manager of the Company's Corporate Tax Planning Unit, candidly conceded that there are various situations in which the arrangements between a domestic parent and a controlled foreign corporation could have an impact on the parent's federal income tax return. (Tr. 141-143)[7] The Revenue Service should be able to determine for itself whether any of the questionable payments were made under circumstances or arrangements which would trigger domestic tax consequences.

The respondents also claim that the summons should not be enforced because the "information sought is . . . already within the Commissioner's possession." *United States* v. *Powell*, supra, 379 U.S. at 57. Respondents misconstrue the quoted words, which obviously refer to the data sought by the summons itself. Clearly, respondents' failure to provide the data specified in the summons is the reason this enforcement proceeding was instituted. The information which is "already within the Commissioner's possession" is simply that which the respondents have unilaterally chosen to reveal to him. As set forth above, the Commissioner

---

[7] One example cited was where a controlled foreign company creates an off-book account, not shown on its records, from which it disburses funds in the foreign country for the benefit of the American parent. This, the witness testified, would have an impact on the domestic tax return of the parent as a constructive dividend. (Tr. 141)

desires additional information, and he is not bound to accept the respondents' determination of relevancy at face value.

Finally, respondents claim in their brief that the summons here constitutes nothing more than a "fishing expedition." If this be so, this claim was fully answered in *United States* v. *Giardano,* 419 F.2d 564, 568 (8th Cir. 1970):

> "Taxpayer in his brief characterized the Government's efforts as a 'fishing expedition.' If so, the Secretary or his delegate has been specifically licensed to fish by § 7602."

For the reasons herein stated, I find that the summoned material is not shielded from disclosure by the attorney-client privilege, nor by the work product doctrine, and that the standards required for judicial enforcement of the summons have been met. Therefore, I respectfully recommend that an order be entered compelling the respondents to comply with its terms.

/s/ STEPHEN W. KARR
Stephen W. Karr, United States Magistrate

Dated: February 23, 1978

## APPENDIX C

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

K77-7 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioners,*

v.

UPJOHN COMPANY and GERARD THOMAS, Vice President
and Secretary,
*Respondents.*

**Order**

Filed April 23, 1978

Magistrate Karr submitted to me his Report and Recommendation in the above matter on February 23, 1978. I promptly read the report and the briefs submitted by the parties and agreed with the Report and Recommendation.

The February 28, 1978 issue of U.S. Law Week, which arrived on March 3, 1978, reports on a recent decision of the Eighth Circuit Court of Appeals dealing with the attorney/client privilege in a factual situation somewhat similar to the Upjohn case. That case is *Diversified Industries Inc.* v. *Meredith*, 46 L.W. 2435, apparently decided on February 15, 1978. A copy of the decision was attached to a letter-amendment to the Magistrate's Report and Recommendation submitted on March 7, 1978.

I have carefully read and considered *Diversified Industries, Inc.* v. *Meredith,* supra, cited by Magistrate Karr in his letter-amendment of March 7, 1978, and his further

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letter-amendment of March 13, 1978. I find the Magistrate's Report and Recommendation is an excellent opinion and is the prevailing law. Therefore, I hereby accept as the opinion of this court the Magistrate's Report and Recommendation.

IT IS SO ORDERED.

Dated: April 28, 1978.

/s/ NOEL P. FOX
Chief Judge, U.S. District Court
Western District of Michigan

CERTIFIED AS A TRUE COPY
Gerald H. Liefer, Clerk

BY /s/ MARY HAMTAK
Deputy Clerk

April 28, 1978.

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION No. K77-7 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioners,*

v.

THE UPJOHN COMPANY and GERARD THOMAS, Vice President,
Secretary and General Counsel,
*Respondents.*

**Order and Final Judgment**

This Court having considered the record in this case as developed before the Magistrate, and having issued an order on April 28, 1978, accepting the Magistrate's Report and Recommendation that the summons be enforced, it is now therefore

ORDERED that the respondents, The Upjohn Corporation and Gerard Thomas, on May *30th*, 1978, at 9:00 a.m. at the office of the Intelligence Division, Internal Revenue Service, Room B-47, Federal Building, 410 W. Michigan Avenue, Kalamazoo, Michigan, obey the summons served upon them on November 23, 1976, and each and every requirement thereof, by testifying and producing all of the books, records, papers and other data set forth in the summons

and referred to in the Petition to Enforce Internal Revenue Service Summons.

DATED: 5/15/78

/s/ NOEL P. FOX
Chief United States District Judge

CERTIFIED AS A TRUE COPY
Gerald H. Liefer, Clerk.

BY /s/ G. E. LARINK, Deputy Clerk.

May 16, 1978.

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1277

UNITED STATES OF AMERICA and DAVID E. NOWAK, IRS,
*Petitioners-Appellees*

v.

THE UPJOHN COMPANY and GERARD THOMAS
in his official capacity,
*Respondents-Appellants*

**Order Denying Petition for Rehearing**

Filed September 10, 1979

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges

No judge of the court having moved for rehearing *en banc*, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

## APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1277

UNITED STATES OF AMERICA and DAVID E. NOWAK, IRS,
*Petitioners-Appellants,*

v.

THE UPJOHN COMPANY and GERARD THOMAS
in his official capacity,
*Respondents-Appellants.*

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges

**Judgment**

Filed June 28, 1979

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed

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in part, reversed in part and the cause remanded for further proceedings.

Each party to pay own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: September 17, 1979

A True Copy.

Attest:

/s/ JO ANN MCHALE
Deputy Clerk

## APPENDIX G

**Internal Revenue Code of 1954 (26 U.S.C.):**

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * *

(b) To ENFORCE SUMMONS.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) JURISDICTION OF DISTRICT COURT.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) ENFORCEMENT.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427 (g)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * *

# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-886**

THE UPJOHN COMPANY, ET AL.,
*Petitioners*

—*v.*—

THE UNITED STATES, ET AL.,
*Respondents*

**On Writ of Certiorari to the Court of Appeals for the Sixth Circuit**

**PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 7, 1979**
**CERTIORARI GRANTED MARCH 17, 1980**

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UNITED STATES DISTRICT COURT
FOR THE SIXTH CIRCUIT

**RECORD ON APPEAL**

I, Gerald H. Liefer, Clerk of the United States District Court for the Western District of Michigan, do hereby certify that the annexed documents consisting of 1 volume(s) of pleadings, 1 volume(s) of transcript, and 0 volume(s) of depositions constitute the Record on Appeal and Relevant Docket Entries in the below captioned case.

*Title of Case*

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service, *Appellee*

VS

UPJOHN COMPANY and GERARD THOMAS,
Vice President & Secretary, *Appellant*

*Counsel for Appellant*—(See Docket Sheet for additional Attorneys)
Name—Wallson G. Knack
Firm Name—Warner, Norcross & Judd
Address—900 Old Kent Bldg., Grand Rapids, Mich. 49503
Tele. No.—(616) 459-6121
SSN—

*Counsel for Appellee*

Name—James S. Brady
Firm Name—United States Attorney
Address—544 Federal Building, Grand Rapids, Michigan 49503
Tele. No.—(616) 456-2404
SSN—

District Judge: Hon. Noel P. Fox, Chief Judge
District Court Docket No. K77-7 Misc.
Date of entry of Judgment: May 15, 1978
Evidentiary Hearing Held: Yes ☐ No ☒
Transcript Included? Yes ☒ No ☐
Exhibits Included? Yes ☐ No ☒
Plaintiff Exhibits Nos.:
Defendant Exhibits Nos.:

If Habeas Corpus, was Certificate of Probable Cause
granted ☐
denied ☐

Nature of the Case: Petition to enforce IRS summons

Notices of Appeal:

Name of Party Filing Notice—Upjohn Company
Date Filed—5-25-78
I F P—Yes ☐ No ☒
Docket Fee Attached—Yes ☒ No ☐
Last Name of Counsel—Knack
Was Counsel Rtn'd ☒ Appt'd ☐

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of this Court at Grand Rapids, Mich. and have transmitted the above record to the Court of Appeals, this 27th day of June, 1978.

/s/ GERALD H. LIEFER

Gerald H. Liefer
Clerk

Dist/Office—646 1
Docket Yr.—77
Docket Number—0007
Filing Date—Mo. Day Year—08 31 77
J N/S O R—Miscellaneous
Judge Number—4604
Docket Yr. Number—K77 Misc. 0007

Plaintiffs

UNITED STATES OF AMERICA and DAVID E. NOWAK

Defendants

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary

**Cause**

June 29 1978

Petition to Enforce Internal Revenue Service Summons

mh

**Attorneys**

*For the United States*

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United States Attorney
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(616) 372-2404

Jerome Fink, Attorney #6
Tax Division
Department of Justice
Washington, D. C. 20530

*For Defts.*

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459-6121

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Hamel, Park, McCabe & Saunders
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Washington D.C. 20006
202-785-1234

Charles McNelis
Welch & Morgan
300 Farragut Bldg.
900 Seventeenth Street, N.W.
Washington D.C. 20006
202-296-5151

*Filing Fees Paid*

Date—5-30-78
Receipt Number—Warner, Norcross (Appeal) $255.00
C.D. Number—#33220
#33218

U.S.A. & David E. Nowak

v.

Upjohn Company and Gerard Thomas, Vice P

**Proceedings**

1977 — Nr.

Aug 31—1—Filed petition to Enforce Internal Revenue Service Summons with exhibit 1 and affidavit of David E. Nowak attached

Aug 31—2—Filed Order to Show Cause hearing 9-26-77 before Stephen W. Karr at 1:30 p.m.; written response required w/in 15 days after service

Aug 31—Summons issued and delivered to U.S. Marshal

Sep 14—3—Filed Appearance of Atty. Wallson G. Knack, R. Roberts & C. McNelis on behalf of defts.

Sep 16—4—Filed Response by respondents to petition to enforce Internal Revenue Service Summons w/certificate of service

Sep 15—5—Filed Marshal's return showing service upon Gerard Thomas as UNEXECUTED; (on vacation) showing service upon Upjohn Co. via Mary R. Welch, Ass't Corp. Sect. on 9-01-77

Oct 5—6—Filed pltfs' opposition to respondents' motion to expedite discovery and accompanying interrogatories and motion to produce with cert. of service

Oct 6—7—Filed defts motion to expedite discovery and cert of service

Oct 6—8—Filed defts motion to produce with cert of service

Oct 6—9—Filed notice of hearing on motion to expedite discovery

Oct 6—10—Filed defts interrogatories to U.S. with cert of service

Oct 6—11—Filed affidavit of service for pleadings 7 and 9

Oct 7—12—Filed Defts' Opposition and Motion to Dismiss Petition to Enforce Internal Revenue Summons with certificate of service

Oct 7—13—Filed BRIEF in Support of Opposition and Motion to Dismiss (pldg #12) with certificate of service

Oct 7—14—Filed Affidavit of Gerard Thomas w/exhibits 1, 2, 3 & 4 attached

Oct 11—15—Filed petitioners' brief in support of their petition to enforce an internal revenue service summons w/cert. of service

Oct 11—16—Filed Respondent's response to Government's opposition to motion to expedite discovery w/cert. of service

Dec 5—17—Filed respondent's brief in support of opposition and motion to dismiss petition to enforce internal revenue summons w/certificate of service

Dec 5—18—Filed Respondents' proposed findings of fact w/certificate of service

Dec 5—19—Filed petitioners' Post Hearing Brief in support of their Petition to enforce an Internal Revenue Summons w/certificate of service

Dec 13—20—Filed Petitioners' Reply Brief w/certificate of service

Dec 15—21—Filed Reply of Respondents to Petitioners' Post Hearing Brief with certificate of service

Nov 8—21a—Filed proceedings held 10-12-77 at G.R. before Mag. Karr with exhibits

1978

Feb 23—22—Filed Report and Recommendation of Magistrate that order be entered compelling respondents to comply

Feb 24—23—Filed letter of Mag. showing proof of mailing of report & recommendation to attys Brady, Fink, Knack, Roberts & McNelis

Mar 3—24—Filed respondents' motion for extension of time to file Objections to Recommendation of the U.S. Magistrate w/ORDER extending time to file to on or before March 10, 1978

Mar 6—Copies mailed to W. Knack, U.S. Atty., J. Fink, R. Robers, & C. McNeils

Mar 8—25—Filed respondents' motion for reconsideration and objection to Report and Recommendation of Magistrate

Mar 8—26—Filed Brief in support of respondents' motion for Reconsideration and Objection to Report & Recommendation of Magistrate w/attachment

Mar 23—27—Filed Petitioners' Response to the Respondents' Objection to report and Recommendation of Magistrate w/certificate of service

Mar 23—28—Filed letter from Magistrate Karr addressed to Judge Fox which is extending the time for filing objections to the Report & Recommendation to 3-17-78 (copies were mailed to all counsel via Magistrate Karr's Office)

Mar 23—29—Filed letter from Magistrate Karr addressed to Judge Fox in response to Respondents' motion for Reconsideration & Objection to Report and Recommendation (copies mailed by Magistrate Karr's Office)

Mar 28—30—Filed ORDER Accepting Magistrate's Report and Recommendation entered 2-28-78

Mar 28—30—Copies of order (pldg #30) mailed to attys Fink, Knack, Roberts, McNelis and given to U.S. atty

May 16—31—Filed ORDER and Final Judgment that respondents to obey summons serv 11-23-77 by testifying and producing documents on 5-30-78 at 9:00 a.m. in Kalamazoo, MI

May 25—32—Filed Respondents' Motion for Stay Pending Appeal, with attached Certificate of Service

May 25—33—Filed ORDER staying Order and Final Judgment entered 5-15-78 pending Mandate of Court of Appeals

May 25—Copy of Order mailed to Attys. Roberts, McNelis, Fink & Brady 4j

May 25—34—Filed Respondent Upjohn Company's *Notice of Appeal* from Order of May 15, 1978, with attached Certificate of Service

May 25—Copy of Notice of Appeal given to Attys. Roberts, McNelis, Fink & Brady

May 25—35—Filed Respondents Designation of Contents of Record and Statement of Points, with attached Certificate of Service

June 1—Copy of Notice of Appeal given to Judge & Ct. Reporters

June 1—Copy of Notice of Appeal and copy of docket sheet mailed to Ct. of Ap.

June 27—Mailed record on appeal (circled pleadings) to Court of Appeals with certificate of record on appeal and copy of docket entries

June 27—Mailed copy of certificate of record on appeal and docket entries to Attys. Brady, Fink, Knack, Roberts & McNelis

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Appeal From Western District of Michigan, S.D. at Grand Rapids**

**GENERAL DOCKET**

Case No. 78-1277

*Title of Case*

UNITED STATES OF AMERICA and DAVID E. NOWAK, IRS, *Petitioners-Appellees,*

vs.

THE UPJOHN COMPANY and GERALD THOMAS in his official capacity, *Respondents-Appellants.*

*(Fed. Ques.) Internal Revenue Code/summons*

No. below: K77-7 Misc CA
Judge below: Fox
Date of Judgment: May 16, 1978
Notice of appeal filed: May 25, 1978

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M. Carr Ferguson, Jerome Fink
Assistant Attorney General
Tax Division, Dept. of Justice
Washington, D. C. 20530
Gilbert E. Andrews
202-739-5193
Crombie Garrett, R. Bruce Johnson

*Date—Account of Appellant*

6/30/78—Warner, Norcross & Judd #17241 74-5/724

Received 50.00

*Remarks*—Certified record returned to District Court 9/17/79

June 30, 1978—Treasurer of U.S.—Acc't Fees Earned Disbursed 50.00

**Filings—Proceedings**

Date

1978

5/30—Copy of Notice of Appeal

6/30—*Certified Record* (1 vol. pleadings and 1 vol. transcript) filed and cause docketed

7/10—Appearance of C. McNelis for appellant

7/10—Appearance of W. Knack for appellant

7/17—Appearance of M. Ferguson and G. Andrews for appellees

8/11—Appearance of R. Roberts for appellant, Gerald Thomas

8/11—Brief (25) of appellant (m-8/9)

8/11—Joint appendix (10) (m-8/9)

8/18—Appearance of W. Knack for appellant

8/18—Appearance of C. McNelis for appellant

9/5—Motion: appellee's brief to 10/8/78 (m-9/1) (Ext. to 10/8/78 granted JPH 9/6)

10/12—Appearance of C. Garrett and R. Johnson for appellee

10/12—Brief (25) of appellees (m-10/10)

10/26—Reply brief (25) of appellant (m-10/24) Substituted by brief of 10/30

10/30—Reply brief (25) of appellant (m-10/26) Replacement copies of brief for brief filed 10/26

11/30—Motion of appellee to expedite appeal (m-11/24)

12/6—Reply of appellant to motion of appellees to expedite (m-12/5)

1979

1/10—Order granting appellee's motion and directing that this case be set for oral argument at the earliest practicable date (Peck, J.)

2/21—Cause argued by R. M. Roberts for Appellant, by J. Fink for Appellee and case submitted to the Court (Before: Celebrezze, Keith and Merritt, JJ.)

3/7—Additional citations of appellee (m-3/2)

5/24—Additional citations of appellant (m-5/23)

6/13—Additional citations of appellant (m-6/11)

6/28—Judgment of the District Court affirmed in part, reversed in part and case remanded for further proceedings

6/28—Opinion by Merritt, J.

7/12—Petition (15) for rehearing en banc (m-7/12)

9/10—Order denying petition for rehearing (Celebrezze, Keith and Merritt, JJ.)

9/17—Mandate issued (No costs taxed)

9/17—Opinion with mandate

12/14—Notice of filing petition for certiorari 12/7/79 (Sup. Ct.No. 79-886)

1980

3/20—Certified copy of order of Supreme Court granting certiorari 3/17/80

[Filed: August 31, 1977]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioners*

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
*Respondents*

**PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS**

Now come the United States of America and Special Agent David E. Nowak, Internal Revenue Service, by their attorney, Frank S. Spies, United States Attorney for the Western District of Michigan, and show unto this Court as follows:

I

This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 7402(b) and 7604(a), to judicially enforce an Internal Revenue Service summons.

II

The petitioner, David E. Nowak, is a special agent of the Internal Revenue Service employed in Detroit, Michigan, as is Special Agent James M. Rogowski. Special agents of the Intelligence Division are authorized to utilize In-

ternal Revenue Service summonses issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602, and Treasury Regulations § 301.7602-1, 26 C.F.R. § 301.7602-1.

III

The respondent, Upjohn Company, is a Delaware corporation with offices at 7000 Portage Road, Kalamazoo, Michigan 49001, and doing business within the jurisdiction of this Court. The respondent, Gerard Thomas, is Vice President and Secretary of the respondent, Upjohn Company, also with offices at 7000 Portage Road, Kalamazoo, Michigan 49001.

IV

The petitioner, Special Agent David E. Nowak, is conducting an investigation of the federal income tax liabilities of Upjohn Company and its subsidiaries for the calendar years 1972, 1973 and 1974. This investigation was previously assigned to Special Agent James M. Rogowski.

V

The taxpayer, Upjohn Company, assigned its Vice President and Secretary, Gerard Thomas, to conduct an internal investigation of payments made by or on behalf of officials of the company and its subsidiaries to foreign officials. In conducting this internal investigation on behalf of Upjohn Company the respondent, Gerard Thomas acquired books, records, papers and other data and created investigative files, all of which relate to the tax liabilities under investigation by Special Agent David E. Nowak as described in paragraph IV, above.

VI

On November 23, 1976, a summons was issued by Special Agent James M. Rogowski directing the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, to appear before Special Agent James M. Rogowski, on December 7, 1976, at 11:30 a.m., to testify and to produce for examination certain books, records and papers, all as set forth in the attached affidavit and summons. An attested copy of the summons was personally served upon the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, by Special Agent Richard Vervisch on November 23, 1976, by handing it to Gerard Thomas. The summons issued to the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, is attached hereto and incorporated herein as Exhibit 1.

VII

The respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, appeared before the petitioner, Special Agent David E. Nowak, and Special Agents James M. Rogowski and Joseph R. Lubbe, but refused to testify or to produce the books, records and papers required by the summons issued to them and described in paragraph VI, above, and such refusal has continued to the date of this petition.

VIII

The testimony and records sought by the summons issued to the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, are not already in the possession of the Internal Revenue Service and no recommendation for prosecution of the taxpayer has been made to the United States Department of Justice.

IX

It was and now is essential to the determination of the federal tax liabilities of the taxpayers, Upjohn Company and its subsidiaries, for the years 1972, 1973 and 1974, that the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, be required to testify and to produce the records demanded, as is evidenced by the affidavit of the petitioner, Special Agent David E. Nowak, attached hereto and incorporated herein as part of this application.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, to show cause, if any they have, why they should not comply with and obey the aforementioned summons and each and every requirement thereof.

2. That the Court enter an order directing the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, to obey the aforementioned summons and each and every requirement thereof, and ordering their attendance and testimony and the production of the books, records and papers as required and called for by the terms of the summons before Special Agent David E. Nowak, or any proper officer of the Internal Revenue Service, at such time as may hereafter be fixed by Special Agent David E. Nowak, or any proper officer of the Internal Revenue Service.

3. That the United States recover its costs in maintaining this action.

4. That the Court render such other and further relief as is just and proper.

FRANK S. SPIES
United States Attorney

"EXHIBIT 1"

**SUMMONS**

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

In the matter of the tax liability of
THE UPJOHN COMPANY
7000 Portage Road
Kalamazoo, Michigan 49001
Internal Revenue District of Detroit
Period(s) 1972, 1973, 1974

The Commissioner of Internal Revenue

To Gerard Thomas, Vice President and Secretary
The Upjohn Company
At 7000 Portage Road, Kalamazoo, Michigan 49001

Greetings: You are hereby summoned and required to appear before James M. Rogowski, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth.

The following records of the Upjohn Company:

All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.

Place and time for appearance:

at Federal Building, 410 W. Michigan Avenue, Kalamazoo, MI 49005, Rm. B-41 on the 7th day of December, 1976 at 11:30 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 23rd day of November, 1976.

Original

JAMES ROGOWSKI, Special Agent

Signature, Title Form 2039 (Rev. 2-74)

Authorized By: JOSEPH R. GUDDE, Group Manager
Signature, Title

Prior Authorization Received From:

Name, Title

On

Date Signature Issuing Officer

"EXHIBIT 1"

**CERTIFICATE OF SERVICE OF SUMMONS**

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date—November 23, 1976. Time—11:45 a.m.
How Summons Was Served:

☒ I handed an attested copy of the summons to the person to whom it was directed.
GERARD THOMAS

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed.

RICHARD C. VERVISCH, Special Agent
Signature, Title

Sec. 7603—Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION No.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioners*

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
*Respondents*

**AFFIDAVIT**

DAVID E. NOWAK, a petitioner herein, being first duly sworn, deposes and says:

1. I am a duly commissioned special agent of the Intelligence Division of the Internal Revenue Service with post of duty in Detroit, Michigan, and performing my duties under the District Director of Internal Revenue, Detroit, Michigan.

2. In my capacity as a special agent I was assigned to investigate the federal tax liabilities of Upjohn Company, 7000 Portage Road, Kalamazoo, Michigan 49001, and its subsidiaries, for the calendar years 1972, 1973 and 1974. The investigation was previously assigned to Special Agent James M. Rogowski.

3. The taxpayer, Upjohn Company, assigned its Vice President and Secretary, Gerard Thomas, to conduct an internal investigation of payments made by or on behalf of officials of the company and its subsidiaries to foreign officials. In conducting this investigation on behalf of Upjohn Company, Gerard Thomas acquired books, records and papers and other data, and created investigative files, all of which relate to the investigation of the federal tax liabilities of Upjohn Company and its subsidiaries.

4. Pursuant to such investigation and in accordance with Sections 7602 and 7603 of the Internal Revenue Code of

1954, 26 U.S.C. §§ 7602 and 7603, a summons, Treasury Form 2039, was served upon Upjohn Company and Gerard Thomas, Vice President and Secretary on November 23, 1976, by Special Agent Richard Vervisch personally handing an attested copy to Gerard Thomas. That summons, which is attached hereto as Exhibit 1 to this application and made a part hereof, directed Upjohn Company and Gerard Thomas, Vice President and Secretary, to appear before Special Agent James M. Rogowski on December 7, 1976, at 11:30 a.m., at Room B-41, Federal Building, 410 West Michigan Avenue, Kalamazoo, Michigan 49005, then and there to give testimony and to produce books, records and papers relating to the federal tax liabilities of Upjohn Company for the years 1972, 1973 and 1974.

5. The respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, appeared but refused to testify or produce the books, records and papers required by the summons issued to them, and such refusal has continued to the date of this affidavit.

6. The testimony and books, records and papers sought by the summons issued to Upjohn Company and Gerard Thomas, Vice President and Secretary, are not already in the possession of the Internal Revenue Service, and no recommendation for prosecution of the taxpayer has been made to the United States Department of Justice.

7. The testimony and books, records and papers demanded by the summons served upon Upjohn Company and Gerard Thomas, Vice President and Secretary, are necessary for the determination of the federal tax liabilities of Upjohn Company and its subsidiaries for the years 1972, 1973 and 1974.

DAVID E. NOWAK, Special Agent
Intelligence Division
Internal Revenue Service

Subscribed and sworn to before me this .... day of ....., 1977.

Notary Public

My commission expires: .....

[Filed: August 31, 1977]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioners*

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
*Respondents*

**ORDER TO SHOW CAUSE**

Upon the petition, the exhibit attached thereto, the affidavit of Special Agent David E. Nowak, Internal Revenue Service, and upon the motion of Frank S. Spies, United States Attorney for the Western District of Michigan, it is

ORDERED that Upjohn Company and Gerard Thomas, Vice President and Secretary, appear before the United States District Court for the Western District of Michigan, Southern Division, in that branch thereof presided over by the undersigned on the ..... day of ....., 1977, at ..... to show cause why they should not be compelled to obey the Internal Revenue Service summons served upon them on November 23, 1976. It is further

ORDERED that a copy of this Order, together with the petition and exhibit thereto, be personally served upon Upjohn Company and Gerard Thomas, Vice President and Secretary, on or before ....., 1977. It is further

ORDERED that Upjohn Company and Gerard Thomas, Vice President and Secretary, shall file a written response to the petition within five (5) days after service of the petition upon them.

Dated at ....., Michigan, this ..... day of ....., 1977.

United States District Judge

[Filed: September 16, 1977]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. K77-5 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioners*

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
*Respondents*

**RESPONSE TO PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS**

Respondents, the Upjohn Company and Gerard Thomas, by their respective attorneys, pursuant to the Order issued by this Court on August 31, 1977, answer the Petition of Special Agent David E. Nowak as follows:

**Answer**

Any allegations not specifically responded to herein are denied. Respondents further respond to the petition as follows:

1. Respondents admit the allegations contained in paragraph I;

2. Respondents admit the allegations contained in the first sentence of paragraph II and state that the second sentence of paragraph II sets out a legal conclusion to which no response is necessary;

3. Respondents admit the allegations contained in paragraph III and state that Gerard Thomas is a licensed attorney and is General Counsel to the Upjohn Company;

4. Respondents state that they do not have sufficient knowledge or information to form an opinion or belief

concerning the truth of the allegations contained in paragraph IV;

5. Respondents deny the allegations contained in paragraph V but state that Gerard Thomas, as General Counsel of the Upjohn Company, was asked to advise the Company about the legal consequences of payments which may have been made to employees of foreign governments or to third parties believed to be acting as intermediaries for such employees by the Company or by one or more of its affiliates. In his capacity as General Counsel, Mr. Thomas undertook an inquiry of the nature and extent of such payments;

6. Respondents admit the allegations contained in the first and second sentences of paragraph VI and admit that a copy of the summons issued to the respondents is attached to the petition but deny any allegations which may be incorporated in the petition by reference to the summons and not expressly set out in the petition;

7. Respondents admit the allegations contained in paragraph VII;

8. Respondents deny the allegations contained in paragraph VIII;

9. Respondents deny the allegations contained in paragraph IX;

**Defenses**

Respondents, in further response to the petition, hereinafter set forth the following defenses to compliance with the summons:

1. The documents demanded by the summons referred to in paragraph VI of the petition are privileged by reason of the Attorney-Client privilege and therefore are not lawfully subject to involuntary disclosure by the enforcement of a summons;

2. The documents demanded by the summons referred to in paragraph VI of the petition constitute the work product

of Gerard Thomas acting as attorney for the Upjohn Company and therefore are not lawfully subject to involuntary disclosure by enforcement of a summons;

3. The summons referred to in paragraph VI of the petition was not issued in good faith nor for any valid purpose within the scope of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C., and therefore compliance with the summons should not be enforced;

4. The summons referred to in paragraph VI of the petition is vague, overly broad, and requests documents which are already in the possession of the United States and which do not relate to the tax liability of the Upjohn Company.

Respectfully submitted,

Wallson G. Knack
900 Old Kent Building
One Vandenberg Center
Grand Rapids, Michigan 49502
Attorney for the Upjohn Company

Charles A. McNelis,
Attorney for the Upjohn Company

Richard M. Roberts,
Attorney for Gerard Thomas

**CERTIFICATE OF SERVICE**

The undersigned attorney states that a copy of the foregoing Response to Petition to Enforce Internal Revenue Service Summons was duly served on the United States by mailing, postage prepaid, to Frank S. Spies, United States Attorney for the Western District of Michigan, 544 Federal Building, Grand Rapids, Michigan 49503, on the 9th day of September, 1977.

Richard M. Roberts,
Attorney for Gerard Thomas

[Filed: October 7, 1977]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. K77-5 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioner,*

v.

THE UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
*Respondents,*

**AFFIDAVIT OF GERARD THOMAS**

GERARD THOMAS, a respondent, being first duly sworn, deposes and says:

1. I am a duly licensed attorney in the States of Michigan and New York and, am employed as General Counsel by The Upjohn Company and its affiliated companies.

2. In January 1976, in my capacity as General Counsel, it came to my attention that certain payments might have been made by The Upjohn Company or its affiliates to employees of foreign governments or to third parties who may have been acting as agents for employees of foreign governments. My advice was requested concerning the legal effect which such payments would have.

3. I immediately conferred with attorneys in private practice who are experienced in tax matters and the requirements of the Securities and Exchange Commission, outside tax counsel and outside SEC counsel.

4. It was recognized that, in the event questionable payments had been made, there was a possibility that litigation

would be initiated by the shareholders or the SEC against the company or its officers and directors. It was also recognized that there was a possibility that criminal charges could be brought against the company or its officers or directors.

5. As a preliminary step to giving legal advice concerning such payments, it was recommended by outside counsel that I should conduct an inquiry into the nature and extent of such payments. This recommendation was made to R. T. Parfet, Jr., Chairman of the Board, and he directed me to conduct the inquiry.

6. My investigation was conducted for the following purposes:

a. To ascertain if any laws had been violated and, if so, the extent of any such violations;

b. To advise the corporation how business could be conducted to avoid the possibility of any questionable payments the future;

c. To advise the corporation on what disclosures, if any, should be made to governmental agencies and the manner and nature of any such disclosures;

d. To obtain information necessary for defense of any lawsuits or legal proceedings which might involve the Company or employees as a result of such disclosures.

7. The inquiry which I conducted with the assistance of outside counsel included interviews with 86 top level management officials of the Company and its affiliates. Interviews were conducted only with individuals who had overall supervisory responsibility for the expenditures of a particular branch, subsidiary, division or other operating unit of the Company or with individuals who were substantially concerned with such expenditures.

8. I made notes during these interviews. In some instances, there were follow-up interviews and telephone

conversations with some of the employees and notes were made of these. These notes and memoranda contain my mental impressions, conclusions and opinions.

9. A list of each of the persons interviewed is attached hereto as Exhibit 1.

10. Each of the persons interviewed was given a letter from R. T. Parfet, Jr., Chairman of the Board of The Upjohn Company, directing him to respond to me and advising him of the confidential nature of the inquiry. A copy of that letter is attached hereto as Exhibit 2.

11. As a part of my inquiry I also prepared a questionnaire with the assistance of outside counsel which was sent to the managers of the Company's 53 foreign affiliates. The questionnaire directed that each of the recipients treat my investigation and the information which it developed as "highly confidential." A copy of that questionnaire is attached hereto as Exhibit 3.

12. My notes of interviews and the questionnaire responses have been used exclusively by counsel of The Upjohn Company and have not been otherwise disclosed.

13. The objective of my inquiry was to identify payments which were considered "questionable", that is, payments which could have been made to officials or employees of foreign governments or to persons who might have been acting on behalf of such persons either directly or indirectly. Officials of the Company who were contacted were advised to interpret the inquiry broadly and to resolve any doubts in favor of including an item, even to the point of including an item where no Company records reflected the payment. In effect, my inquiry was not limited to uncovering payments which would be illegal or improper under the laws of a particular country or under the laws of the United States. There was also no attempt to limit the inquiry to payments which would constitute illegal bribes, kickbacks or other nondeductible payments under Section 162(c) of the Internal Revenue Code of 1954.

14. After it was determined that questionable payments had been made, the Company, in March of 1976, made a preliminary report to the Securities and Exchange Commission according to its Form 8-K which disclosed such questionable payments.

15. Contemporaneously, the same information was voluntarily disclosed to the Internal Revenue Service by sending to that organization a copy of the Form 8-K.

16. At the time that this disclosure was made, the Internal Revenue Service had concluded its regular audit of the 1972 and 1973 income tax returns of the Company. The civil tax liability of the Company had been finally determined and an IRS Form 870-C which reflected that liability for both years was executed by the Company and filed with the Internal Revenue Service. A copy of that form is attached hereto as Exhibit 4.

17. Subsequently, the Internal Revenue Service commenced a criminal investigation of the 1972, 1973 and 1974 income tax returns of the Company and Special Agents of the Intelligence Division contacted Company officials. Additionally, the Company was advised on February 23, 1977, that the Internal Revenue Service was opening up an investigation of the 1974 and 1975 Federal income tax returns and that Special Agents would supervise that investigation as well.

18. In July 1976, after more complete information was obtained, the Company filed with the S.E.C. an amendment to its Form 8-K for March, 1976, which disclosed additional questionable payments. It was also disclosed that some of these payments had been included in the U.S. consolidated income tax returns filed by the Company.

19. Contemporaneously, the same information was voluntarily disclosed to the Internal Revenue Service by sending to that organization a copy of the amendments to the Company's Form 8-K for March, 1976.

20. During the course of their investigation, the Special Agents were advised of the nature and extent of the investigation which I was conducting. They were provided with copies of invoices, vouchers, advices, cancelled checks and any other such documents which had been turned up by the Company during my investigation relating to all of the questionable payments made by foreign branches of United States subsidiaries of The Upjohn Company. Except in one instance, the Company did not attempt to obtain such information from foreign subsidiaries because the payments made by these corporations are not reflected on the U.S. income tax returns of the Company. In the only instance in which such information was obtained from a foreign subsidiary, that information was also turned over to the Special Agents. The books and records of the Company were made available to the Agents and on various occasions Company personnel worked with them to show the Agents the manner in which questionable payments were traced to the Company's U.S. tax returns. The Agents were provided with a list of persons interviewed by me or by outside counsel (Exhibit 1) and were advised that all persons still employed by the Company would be made available at his duty station for an interview by the Internal Revenue Service. The agents were also advised that, if any foreign-based officials came to the United States they would be made available for an interview at that time. The Agents were also provided with a copy of Mr. Parfet's letter regarding the confidential nature of my inquiry (Exhibit 2) and a copy of the questionnaire which was sent to the managers of the foreign affiliates of the Company. (Exhibit 3).

21. As of this date, Special Agents of the Internal Revenue Service have actually interviewed twenty of the individuals who were contacted either by me or by outside counsel during my investigation and they have expressed interest in interviewing another twenty-five of those in-

dividuals many of whom are in the United States and all of whom will be made available for an interview.

22. The Special Agents insisted that they be provided with my notes of interviews and the responses to the questionnaire. This demand was refused on the grounds that these documents were privileged communications of a client to an attorney, that they were the work product of an attorney, that they included material related to payments which did not affect the United States income tax returns of the Company and were otherwise irrelevant.

23. On November 23, 1976, Special Agent Rogowski issued the summons involved herein. On December 7, 1976, after consultation with outside counsel, I appeared before the Special Agents and again refused to produce my notes and the questionnaire responses on the grounds that such disclosures would violate the attorney-client privilege, the attorney work product rule and on the grounds that the documents requested included material relating to payments which do not affect the United States tax returns of the Company and which are otherwise irrelevant to the investigation of the 1972 through 1974 income tax returns of the Company.

Further, affiant saith not.

Gerard Thomas

Subscribed and sworn to before me on this ..... day of ....., 1977.

Notary Public

My Commission Expires: .....

EXHIBIT 1

[Filed with Affidavit of Gerard Thomas: October 7, 1977]

**MEMO**

To: D. E. Nowak

From: O. Thomas

Subject: Questionable Payments

Date: January 21, 1977

Copies To:

At our meeting in Detroit, you requested a list of the names and positions of the persons interviewed in the investigation of questionable payments. Attached is a list of the persons interviewed by me or by outside counsel during this investigation. If the employment of the person has terminated for any reason, the date of the termination is shown.

jc

att.

**FOREIGN PAYMENTS INTERVIEW LIST**

| Name | Position* |
|---|---|
| James E. Beadle | Manager, International Accounting and Financial Reports |
| Michael G. Beck | Director, Commercial Division, International |
| Ray Bennett | Manager, Tax and Governmental Regulation Services, International (10/18/74) |
| Roberto Brenes | General Manager of Guatamala |
| R. R. Casler | General Manager of Hong Kong |
| Moacyr Castagna | Financial Controller of Brazil |
| Ronald J. Chambers | Group Vice Pres. Pacific Division |
| Robert W. Collins | Resources Planning Director |
| Kenneth R. Crawley | Medical Director, International Medical Planning |
| David S. Creamer | Manager, Corporate Tax Planning |
| Bernard Daum | Ag. Vet. Div. Mgr. South Africa |
| Carl H. Duisberg | Vice Pres. Central European Division |
| Keith H. Edmondson | Vice Pres. & General Mgr. for Chemical Division |
| Brian Ellis | General Manager, Near East District (stationed in Brussels, Belgium, N.V.) |
| Willi Ewald | General Manager & Vice Pres. of Japan |

* Where employment has terminated, the termination date is indicated.

| Name | Position* |
|---|---|
| Josue L. Faustino | General Manager of Philippines |
| Donald J. Fortman | Vice Pres., Business Development |
| Ce'sar Garza | General Manager, Asgrow Mexicana S.A. |
| Jack Gauntlet | Vice Pres. Corporate Development (4/14/70) |
| Jacques Gauthier | Vice Pres., France, Belgium & Holland Division |
| Jorge Gonzalez | General Manager of Spain |
| Harold Goodwin | Vice Pres. & Div. Mgr., Pacific South Division (stationed in Australia) |
| Nabil A. Habra | General Manager, Middle East District (stationed in Brussels) |
| E. T. E. Hansen | Manager, Market Development, Asgrow |
| David J. Harmelink | Manager, Marketing Research, International |
| Federico G. Hawkins | Manager of Panama |
| Sheldon Hedges | Product Manager, International |
| A. G. Holland | Manager, Financial Services, Polymer |
| W. N. Hubbard | President |
| Mario Iseppi | Presently in management training in Canada, previously General Manager in Hong Kong |
| Wolfgang Jacobi | General Manager in Germany |

* Where employment has terminated, the termination date is indicated.

| Name | Position* |
|---|---|
| Patrick Kennedy | Marketing Analyst II, Marketing Research, International |
| Vitaliano Kettlitz | Vice Pres. European South Div. (stationed in Italy) |
| John O. Korsten | General Manager, South Africa |
| Otto A. Kreuzer | Manager, International Health Regulatory Affairs |
| Edward J. Lee | Manager International Bid & Tender Negotiations |
| A. R. Lincoln | Group Manager, Corporate Taxes |
| Gerald V. Littig | Supervisory Unclassified |
| Lewis R. Long | General Manager in Mexico |
| C. H. Ludlow | Vice Pres. & Treasurer |
| John F. McIntyre | Secretary & International Counselor, UII |
| William P. McLauchlan | General Manager of Korea |
| John D. Martin | General Manager of The Upjohn Manufacturing Company |
| Donald C. Meitz | Director, Corporate Auditing & Office Methods & Procedures |
| Jorge A. Merigo | Vice Pres. Latin America, North Div., (stationed in Mexico) |
| Warren Miller | Executive Unclassified (5/31/76) |
| Harold E. Mill | Manager, East Africa Districts |
| Denzil K. Minkley | Office & Finance Manager, South Africa |

* Where employment has terminated, the termination date is indicated.

| Name | Position* |
|---|---|
| Jonas Mutashubilwa | District Sales Manager, East Africa District I |
| Willem C. Nolte | Sales Manager, South Africa |
| Anthony Obregon | Assistant Secretary, Upjohn S.A. de C.V. |
| Fernando Olazarri | General Manager of Brazil (1/77) |
| Roberto Ortega | Ag. Vet. Latin America, Area Manager, International |
| Jacques Ory | Administrative Manager, N.V. (stationed in Brussels) |
| David E. Osmun | Product Manager, International |
| P. S. Parish | Vice Chairman of the Board |
| Pier Paolo Partiseti | Area Manager for Italy, Yugoslavia, Greece |
| David A. Phillipson | Vice Pres. & General Manager for Ag. Div. |
| Neville Pritchard | General Manager of Thailand |
| Ray T. Parfet, Jr. | Chairman of the Board |
| Richard Rakow | Supervisor, Pharmaceutical Packaging |
| Henry Roberts | Vice Pres. & Sr. Training Consultant, UII (11/30/69) |
| John Rogstad | Vice Pres. Latin America South (stationed in Brazil) |
| Carlos A. Salvagni | General Manager in Argentina |
| Francis Santiago | Vice Pres., Latin America Div. II (stationed in Venezuela) (5/31/73) |

* Where employment has terminated, the termination date is indicated.

| Name | Position* |
|---|---|
| Thomas G. Schalk | Vice Pres. Ag. Vet. Div., International |
| Lee F. Seguin | Controller, International Financial Services |
| Eugene S. Shepherd | Vice Pres. & Treasurer, International |
| Alistar A. Smith | Vice Pres. Africa, Mid. East Div. |
| Kimon G. Softas | General Manager of Greece |
| Theo Stiftl | General Manager of Taiwan |
| Henry Suarez | General Manager of Colombia |
| W. E. Sykes | Group Vice Pres., Upjohn International |
| Richard D. Tedrow | Vice Pres. for International |
| Joao Teixeira | General Manager of Peru (7/31/76) |
| Donald D. Threlkeld | Director, Polymer Chemicals Marketing |
| Ronald Tobin | Group Vice Pres. Western Hemisphere |
| Harry J. Tomlinson | Supervisory Unclassified |
| Paolo B. Trambusti | General Manager, International Development, Asgrow |
| John VanLiere, Jr. | Manager, Administrative, Chemical Div. |
| W. J. VanderWalt | Manager, South African Breeding Station |
| R. R. Vermillion | Executive Vice President, Asgrow |

* Where employment has terminated, the termination date is indicated.

| Name | Position* |
|---|---|
| Selvi Vescovi | Group Vice Pres. European Div. |
| John B. Wilkinson | Attorney III, International |
| Daniel D. Witcher | Pres. Upjohn International, Inc. |
| Bryan O. Wright | Vice Pres. & Div. Manager, Pacific North Division (stationed in Japan) |

CT:jc
1/21/77

* Where employment has terminated, the termination date is indicated.

EXHIBIT 2

[Filed with Affidavit of Gerard Thomas: October 7, 1977]

THE UPJOHN COMPANY
KALAMAZOO, MICHIGAN 49001

R. T. PARFET, JR.
*Chairman of the Board*

January 16, 1976

Dear

I have asked Gerard Thomas to investigate certain matters of particular concern to Corporate Management and to the Board of Directors. As chairman of the board and chief executive officer, I feel the subject must be thoroughly reviewed and have charged Gerard Thomas with that responsibility.

The subject matter must be treated as highly confidential and is not to be discussed with or disclosed to anyone other than Gerard Thomas or individuals he shall designate.

It is imperative that you be completely candid and cooperate fully in responding to questions and requests for information.

I appreciate your understanding of the importance of this matter and reemphasize the need for candid cooperation and confidentiality.

Very truly yours,

/s/ R. T. PARFET, JR.
R. T. Parfet, Jr.

RTP:jc

Resp. Exhibit No. 2—Date 10/12/77. Dep. Clk. L. G. R.

EXHIBIT 3

[Filed with Affidavit of Gerard Thomas:
October 7, 1977]

THE UPJOHN COMPANY
KALAMAZOO, MICHIGAN 49001

R. T. PARFET, JR.
*Chairman of the Board*

March 8, 1976

To All Foreign General and Area Managers:

In recent months, as you may be aware, it has been disclosed that several American companies, including some in the pharmaceutical industry, have made possibly illegal or improper payments to officials or employees of foreign governments and to others in connecton with foreign business. It has also been disclosed that, in order to conceal such payments, some companies have maintained "off the books" accounts or have entered such payments in accounts which inaccurately or inadequately describe the purpose for which a payment was made. I have decided that it is imperative that the management of this company has full knowledge of any payments such as those described above made by The Upjohn Company or any of its subsidiaries. To gather this information I am seeking your help.

I have asked Gerard Thomas, the company's General Counsel, to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by The Upjohn Company or any of its subsidiaries to any employee or official of a foreign government from January 1, 1971 to the present. As an initial step in this investigation, I am asking that you and all other general managers of foreign subsidiaries provide us with full and complete responses to the following inquiries:

(1) Please provide any information which may be available within the subsidiary relating to the direct or indirect payment of funds under the Company's control to or for the benefit of any official or employee of a government agency or facility, including a hospital owned or operated by the government, during the period under investigation. Please schedule all such payments and describe in as much detail as you believe necessary the reasons for which each scheduled payment was made.

If a payment is less than $500 it is not necessary to schedule and describe it unless there are a series of payments to the same person which exceed $500 in one year. However, you should estimate the amount of money expended in each year for these lesser payments.

If you cannot absolutely establish that any payments of the types described above have been made, please provide also whatever information may be available within the subsidiary indicating that such payments might well have been made.

(2) Please provide any information that may be available within the subsidiary relating to any direct or indirect payment of funds under the Company's control to or for the benefit of any candidate for political office or any political party during the period under investigation. Please schedule all such payments and describe in as much detail as you believe necessary the reasons for which each such payment was made. If you cannot establish that any such payments were made, please provide whatever information may be available within the subsidiary indicating that such payments might have been made.

(3) Have any payments of funds under the Company's control been made by the subsidiary or any of its

employees which are not reflected on the subsidiary's official company financial and accounting books and records? If so, please provide all pertinent details. If you cannot establish that any such payments were made, please provide all information available within the subsidiary indicating that such payments might have been made.

(4) Have any third party payments been recorded on the official company financial and accounting books and records in accounts the purposes and descriptions of which do not accurately reflect the transactions? If so, please provide all pertinent details. If you cannot establish that any such entries have been made in your books, please provide all information available within the subsidiary indicating that such entries might have been made.

In considering your answers to each of these questions, you should interpret broadly any terms which you find ambiguous. For example: the term "payments" would include money payments, gifts or the payment of expenses such as those incurred for a weekend holiday or a vacation; an "indirect payment" would include payments to distributors or sales representatives all or part of which were or might well have been passed on to government officials or employees; and, as noted above, "official or employee" of a foreign government would include a person working at a hospital owned or operated by the government. As a general rule, any doubts you may have about providing particular information in response to any of the questions set forth above should be resolved in favor of providing the information.

I encourage you to discuss these questions with anyone in your subsidiary who you believe would be able to provide useful information. I also expect that you will have your files and accounting records reviewed to whatever extent you believe necessary in order to be reasonably certain that all relevant information has been provided. If you have

any questions regarding this matter, you should feel free to communicate directly with your management and with Gerard Thomas who has general responsibility for this investigation. In particular, if you will have difficulty in completing your response within one month you should cable Mr. Thomas.

This investigation and the information which it develops should be treated as highly confidential and not discussed with any persons other than those Upjohn employees who might be of assistance to you in providing the information requested. This matter should not be discussed with anyone not employed by the Company except our regularly retained public accounting firms and such persons as are specifically designated by Mr. Thomas. You should send your response to Gerard Thomas, Vice President and General Counsel, The Upjohn Company, 7000 Portage Road, Kalamazoo, Michigan 49001.

I recognize that in the past some employees may have engaged in practices which they believed were in the best interests of The Upjohn Company. However, in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation, I have issued a detailed "Statement of Policy on Political Contributions, Payments to Government Personnel and Proper Accounting Practices." This statement is being disseminated to Upjohn employees worldwide. It will be your continuing responsibility to insure that all Upjohn employees under your supervision are aware of and comply with the rules set forth in this Statement.

I appreciate your understanding of the importance of this matter and reemphasize the need for candid cooperation and confidentiality. Thank you for your assistance.

Very truly yours,

/s/ R. T. Parfet, Jr.
R. T. Parfet, Jr.

RTP:jc

Resp. Exhibit No. 3—Date 10/12/77. Dep. Clk. L.G.R.

EXHIBIT 4

[Filed with Affidavit of Gerard Thomas:
October 7, 1977]

Department of the Treasury • Internal Revenue Service

**Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment**

Form 370-C
(Rev. May 1974)

Data received by Internal Revenue Service

I consent to the immediate assessment and collection of any deficiencies (increase in tax and penalties) and accept any overassessment (decrease in tax and penalties) shown below, plus any interest provided by law. I understand that by my signing this waiver, the corporation will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

| | Increase in Tax and Penalties | |
|---|---|---|
| Taxable year ended | Amount of tax | Penalty |
| 1972 | 146,546. | ——— |
| 1973 | 1,865,055. | ——— |

Name and address of corporation—Number, street, city or town, State, ZIP code
The Upjohn Company and Subsidiaries
Kalamazoo, Michigan 49001

| Signature | Title | Date |
|---|---|---|
| C. H. Ludlow | Vice President & Treasurer | 3-4-76 |

The Internal Revenue Service does not require a seal on this form, but if one is used, please place it here.

NOTE: If you consent to the assessment of the deficiencies shown in this waiver, please sign and return the form in order to limit the interest charge and expedite our bill to you. Your consent will not prevent the corporation from filing a claim for refund (after it has paid the tax) if you later believe it is so entitled; nor prevent us from later determining, if necessary, that the corporation owes additional tax; nor extend the time provided by law for either action.

If the corporation later files a claim and the Service disallows it, the corporation may file suit for refund in a District Court or in the U.S. Court of Claims, but it may not file a petition with the United States Tax Court.

We will consider this waiver a valid claim for refund or credit of any overpayment due the corporation resulting from any decrease in tax and penalties determined by the Internal Revenue Service, shown above, provided this waiver is signed and filed within the period established by law for making such a claim.

Who Must Sign

The waived should be signed with the corporation name, followed by the signatures and titles of the corporate officers authorized to sign. An attorney or agent may sign this waiver provided his action is specifically authorized by a power of attorney which, if not previously filed, must accompany this form.

Form 870-C (Nov. 5-74)

[Filed: November 8, 1977]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. K 77-7 Misc. CA

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioners,*

vs.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
*Respondents.*

Before THE HONORABLE STEPHEN W. KARR, U.S. Magistrate.

**PROCEEDINGS ON PETITION TO ENFORCE
INTERNAL REVENUE SERVICE SUMMONS**

TIME: Wednesday, October 12, 1977

PLACE: Grand Rapids, Michigan

APPEARANCES:

MR. JEROME FINK, and
MR. ROBERT G. NATH
Tax Division
Department of Justice
Washington, D.C. 20530

and

FRANK S. SPIES, U.S. Attorney, by
HUGH W. BRENNEMAN, JR., Asst. U.S. Attorney
Federal Building
Grand Rapids, Michigan 49503

On behalf of the Petitioners;

HAMEL, PARK, MCCABE & SAUNDERS, by
MR. RICHARD M. ROBERTS
1776 F Street, N.W.
Washington, D.C. 20006

On behalf of Gerard Thomas;

WELCH & MORGAN, by
MR. CHARLES A. MCNELIS
300 Farragut Building
Washington, D.C. 20006

and

WARNER, NORCROSS & JUDD, by
MR. WALLSON G. KNACK
900 Old Kent Building
Grand Rapids, Michigan 49503

On behalf of Upjohn Company.

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Grand Rapids, Michigan
Wednesday, October 12, 1977
1:30 p.m.
Magistrate's Courtroom

**PROCEEDINGS**

The Magistrate: Do you want to tell me who is here, Mr. Brenneman?

Mr. Brenneman: Yes, your Honor, I would like to introduce two gentlemen who will be handling this case for the Department of Justice: Mr. Jerome Fink, on my far left; and assisting him will be Mr. Robert Nath.

The Magistrate: Fine. Thank you.

Mr. Knack: Your Honor, I would like to introduce Mr. Richard Roberts on my far right from the law firm of Hamel, Park, McCabe and Saunders in Washington. And seated next to me is Charles A. McNelis of the firm of Welch & Morgan. I would like to move their admission. They are both members of the Detroit Bar and members of the Supreme Court of the United States. They are here on behalf of Defendants Gerard Thomas and Upjohn Company.

The Magistrate: All right. The motion is granted. Welcome, gentlemen.

Mr. Fink: Thank you, your Honor.

The Magistrate: Let's see. That is Mr. Fink?

Mr. Fink: Yes.

The Magistrate: And Mr. Nath?

Mr. Nath: Yes, your Honor.

The Magistrate: Okay. I will keep everybody straight here. All right.

I guess this is an Order to Show Cause.

Mr. Fink: And we are the petitioners, your Honor.

The Magistrate: Do you want to start?

Mr. Fink: It would appear to me to be appropriate.

The Magistrate: All right. Go ahead.

Mr. Fink: I would like to start very briefly perhaps by reading into the record, although presumably it is already a part of the record, the admissions that have been made to our petition, so that we at least have a preliminary framework with which to begin.

I will read into the record, your Honor, only those allegations which have been definitely admitted by the Respondents.

The Magistrate: Very well.

Mr. Fink: This is a proceeding brought under the authority of Section 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. and those sections thereafter, to judicially enforce an Internal Revenue Service summons.

The Petitioner, David E. Nowak, is a Special Agent of the Internal Revenue Service employed in Detroit, Michigan, as is Special Agent James M. Rogowski.

"The Respondent, Upjohn Company, is a Delaware Corporation with offices at 7000 Portage Road, Kalamazoo, Michigan, 49001, and doing business within the jurisdiction of this Court.

"The Respondent, Gerard Thomas, is Vice President and Secretary of the Respondent, Upjohn Company, also with offices at 7000 Portage Road, Kalamazoo, Michigan, 49001."

I might add that was admitted, your Honor. And they added: "And Gerard Thomas is a licensed attorney and is general counsel of Upjohn," something I will expect them to prove.

The Magistrate: Is there any dispute about that?

Mr. Fink: He has several offices, your Honor.

Mr. McNelis: Not from over at this side.

Mr. Fink: We will decide which hat he is wearing at the appropriate time.

The Magistrate: All right.

Mr. Fink: "On November 23, 1976, a summons was issued by Special Agent James M. Rogowski directing the Respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, to appear before Special Agent James M. Rogowski, on December 7, 1976, at 11:30 a.m., to testify and to produce for examination certain books, records, and papers, all as set forth in the attached affidavit and summons," a reference to the items which are attached to our petition, your Honor.

"An attested copy of the Summons was personally served upon the Respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, by Special Agent Richard Vervisch, V-e-r-v-i-s-c-h, on November 23, 1976, by handing it to Gerard Thomas."

The summons is attached, your Honor, to the Petition as Exhibit 1.

"The Respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, appeared before the Petitioner, Special Agent David E. Nowak and Special Agents James M. Rogowski and Joseph R. Lubbe, but refused to testify or to produce the books, records and papers required by the summons issued to them and described," says the Petitioner, "in paragraph VI above," which has been admitted, "and such refusal has continued to the date of this petition.

So, your Honor, I believe we have before us the fact that a petition—or, a summons was issued, duly served, no complaint as to the procedural aspect of the summons, but—in the sense of service, et cetera, but a complaint or a failure to respect to the summons as issued.

And I would like to call to the stand now Special Agent David E. Nowak, who is a petitioner in the cause.

The Magistrate: Mr. Nowak, would you come up here, please.

---

**David E. Nowak,**

a Petitioner herein, called as a witness on his own behalf, testified as follows:

Mr. Fink: Your Honor, is it your practice that we remain seated while we question?

The Magistrate: As you know, I have no preference.

Mr. Fink: No preference one way or the other. I guess at this time we are not wired for sound.

DIRECT EXAMINATION
BY MR. FINK:

Q. Mr. Nowak, you have stated your name, I believe, but for the record, would you state it in full, please?

A. David E. Nowak.

Q. Where are you employed, Mr. Nowak?

A. I am employed by the Internal Revenue Service in Detroit.

Q. And in what capacity?

A. I am a Special Agent with the Intelligence Division.

Q. And you work out of Detroit, is that correct?

A. That's correct.

Q. Briefly, sir, what was your education?

A. I have a Bachelor's Degree from Michigan State University. I majored in accounting, and I attended Wayne State University Law Schol for a year.

Q. What was the year of your graduation from Michigan State?

A. 1966.

Q. How long have you been employed as a Special Agent by the Internal Revenue Service?

A. Ten years.

Q. When were you assigned to the matter which is before us, the Upjohn Company investigation?

A. In December of 1976.

Q. In December of 1976?

A. Yes, sir.

Q. Have you been engaged in that investigation since that assignment?

A. Yes, sir.

Q. Down to date?

A. Yes, sir.

Q. Is it your sole assignment at this time?

A. It is.

Q. Have you been assisted in the course of this investigation by any revenue agents?

A. Yes, sir, I have.

Q. Throughout the course of the investigation, you have been assisted by revenue agents?

A. Yes, sir.

Q. Would you name the Revenue agents who have been assisting you?

A. Lewis Maurer, M-a-u-r-e-r; Frank Sherrod, S-h-e-r-r-o-d; Joseph Nemedi, N-e-m-e-d-i; Ed Ravesz—Edward Ravesz, R-a-v-e-s-z. There has been other agents assigned that specialize in employment taxes and some other areas. I don't recall their names. They assisted briefly.

Q. What years are being covered by your—were being covered by your investigation when you were first assigned?

A. The years under investigation were 1972, 1973, and 1974.

Q. Were you the Agent who issued the summons in question?

A. No, I was not.

Q. What was the name of the Agent who issued the Summons in question?

A. James Rogowski.

Q. Is he here in the courtroom?

A. Yes, he is.

Q. Did you learn on taking over this investigation, or subsequently, that the Upjohn Company is resisting producing the documents and other datum or data summoned by that Summons or called for by that Sommons?

A. Yes, sir.

Q. Did you learn that the Upjohn Company had disclosed to the Securities and Exchange Commission certain illegal bribes, kickbacks, et cetera, and other questionable payments that have been made, either by branches of the Upjohn Company or by their wholly owned or partially owned subsidiaries?

A. Yes, sir.

Q. Offhand, do you have in mind the amount of those questionable payments which the Upjohn Company has conceded to the Securities and Exchange Commission it did in fact or its affiliates did in fact pay?

A. I believe the total dollar amount that was finally arrived at was approximately 4.2 million dollars.

Q. Did you learn after taking over the investigation that the Upjohn Company agrees that at least some of these illegal payments or questionable payments have an impact on their domestic or federal income tax return?

A. Yes, sir.

Q. Incidentally, they file what type of income tax return for the years '72, '73, '74?

A. Well, they file many different types. Among those, they file a consolidated Federal Income Tax Return.

Q. And by consolidated return, we mean——

A. That consolidates the parent corporation and many of its subsidiary operations.

Q. But not all of its subsidiary operations?

A. Correct. And they file what is called a DISC Return. I believe it stands for "Domestic International Sales Corporation."

Q. Now you did learn that they concede that at least some of those questionable payments, including the illegal ones, affected their Federal Consolidated Income Tax Return, is that correct?

A. Yes, sir.

Q. Did you also learn that the Upjohn Company takes the position that some of those payments are not or will not affect their Federal Consolidated Income Tax Return?

A. Yes.

Q. Do you remember, offhand, what portion of the four-million odd dollars you have testified to that they concede were questionable payments, they concede have an impact on the Federal Consolidated Income Tax Return?

A. Approximately 3½ million dollars.

Q. On the Federal Income Tax Return?

A. I am sorry. The part that affects the Federal Income Tax Return is approximately $700,000.

Q. The part that they admit——

A. That they admit.

Q. Yes. And the part that they dispute is the remainder, is that correct?

A. Yes, sir.

Q. Did you learn after taking over this investigation that Mr. Gerard Thomas, an official of the Upjohn Company, had conducted an investigation of the amount and the nature and the extent of the illegal payments?

A. Yes, I did.

Q. Did you learn that among his methods of investigation was sending questionnaires to various individuals?

A. Yes.

Q. And requesting a response thereto?

A. Yes.

Q. Do you understand that the Summons we are seeking to enforce today, at least in part, demands that there should be a production to us of—and I am now quoting from the Summons: "written questionaires sent to managers up the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries"?

A. Yes.

Q. You have not been furnished, have you, with the items that that portion of the Summons seeks to obtain?

A. No, I have not.

Q. Is it necessary to your investigation that you obtain those summons?

Mr. Roberts: Objection, your Honor. That is a conclusion the Court will have to draw. I think he can lay out the basis of why he needs the information, but not why it is necessary.

The Magistrate: Why don't you inquire along that line.

BY MR. FINK:

Q. Do you feel it necessary for your investigation——

Mr. Roberts: Objection again, your Honor. It's how you view these, and not how he does.

Mr. Fink: Well, let's find out first——

The Magistrate: I think the answer is going to be yes, obviously. Let's ask him why he feels that way.

Mr. Fink: All right. The next question, then——

Q. Why do you feel that you should have these documents, if I may add, rather than take the Upjohn Company's assurance as to what the relevance of those documents?

A. Well, I feel that those files may contain evidence that would indicate that there is in fact a tax implication involved in payments which the Company has alleged have no U.S. tax implication. These files may provide leads or other evidence that would have a relationship to those payments that the Company does admit have a U.S. tax implication.

I believe that it would—if it served no other purpose, it would help me corroborate the Company's position that there is no tax impact, if that is what the facts would show upon my investigation of the files.

Q. So while it may be a conclusion that the Court has to draw, in your view the summoned documents were, at the time summoned and are today, necessary to your continuing investigation, is that correct.

A. Yes, sir.

Q. Mr. Nowak, at this time there has been no recommendation for prosecution made to the Department of Justice, has there been?

A. No, sir.

Q. At this time have you yourself made a recommendation for prosecution to anyone?

A. No, sir.

Q. Have you reached in your own mind any fixed determination as to whether or not the Company or anyone else should be prosecuted?

A. No, sir.

Q. When you conclude your investigation, outline for us the possible recommendations that a Special Agent conducting an investigation might make?

A. I could recommend that the investigation be discontinued without prosecution of the Company or any employees, and there may or may not be a tax liability due and owing as result of the tax I uncover. I could recommend the institution of the civil fraud penalty upon a portion or all of the understatement that resulted from the facts that are being investigated, or a recommendation of

criminal prosecution could be made involving either the Company and/or some of its employees or officers, including—or, perhaps not including as well, the recommendation involving tax liabilties or civil fraud penalties.

Q. But so far no recommendation of any type has been made by you?

A. No.

Q. Nor by your predecessor, Mr. Rogowski?

A. No, sir.

Mr. Fink. I have nothing further of the witness at this time, your Honor.

The Magistrate: All right. Mr. McNelis.

Mr. Roberts: Mr. Roberts.

CROSS-EXAMINATION OF DAVID E. NOWAK
BY MR. ROBERTS:

Q. Mr. Nowak, at the time you came into the investigation——

The Magistrate: I mean, Mr. Roberts. Go ahead. I am sorry.

Q. Mr. Nowak, at the time you came into the investigation, the summons had already been issued, is that correct?

A. That's correct.

Q. And it was issued by Mr. Rogowski?

A. Correct.

Q. Do you know the status of the '72-73 civil investigation?

A. I believe I do.

Q. At that time?

A. Yes.

Q. And what was that status?

A. At the time that Summons was issued, it was still open administatively.

Q. But had not there been an 870-C presented to the Company by the Revenue Service?

A. I am not sure what you mean by an 870-C.

Q. This is a waiver of the restrictions on assessment that is provided for in the Code, which, by a taxpayer signing it, he waives his right to a 90-day letter, which entitles him to go to the Tax Court, and he agrees to accept the assessment immediately as opposed to the delay that is provided in the Code, if he doesn't sign the agreement to the assessment?

A. Well, I have never seen that document, but my understanding is it had been signed.

Q. It had been signed?

A. By the Company.

Q. And had been prepared by the Service, is that correct, for their signature?

A. Right.

Q. And the effect of this was to incorporate the agreed adjustments that the Company agreed to in its '72-73 Return and any other adjustments that the Service wanted to make, is that correct?

Mr. Fink: Well, I will object to that, your Honor. The document, if they wish to produce it, would speak for itself.

The Magistrate: Well, it is here. It is Exhibit 4 to Mr. Thomas' affidavit, apparently.

May I show it to the witness, counsel?

Mr. Roberts: Yes.

Q. Have you seen that—after you look at it, Mr. Nowak?

The Magistrate: Is Mr. Thomas here today?

Mr. McNelis: Yes, he is, your Honor.

The Magistrate: Okay. Thank you.

A. To answer that question, I have never seen this before right now.

Q. You have never seen the document before?

A. No.

Q. Now, as to the year 1974, at the time you came into the examination in December, the year 1974 was not and had not been under examination, is that not correct?

A. That's correct.

Q. And it was not open for examination until sometime the following year, early in the year?

A. I am not sure if I understand what you mean. My understanding is that it was open at the time we advised the Company that we were conducting an investigation, that the Intelligence Division had opened an investigation, and it included the year 1974.

Q. Intelligence Division, but I am talking about the civil audit that is now going on the '74-75 tax return was not open and the Company was not informed, was it, until January, 1977?

A. That's correct.

Q. Now you have said that the Company has resisted producing the documents called for in the Summons; is it not true that it is only two classes of documents called for in the Summons, and the third the Company contends did not relate to the Federal Tax Return that are not being produced?

Mr. Fink: Well, I would like counsel to lay—instead of talking about three classes of documents, to specify what class of documents he is talking about as provided for by the Summons. I am not sure. Perhaps the witness and counsel know what they are talking about, but I don't at this juncture.

Mr. Roberts: All right. I will redraft the question, your Honor.

The Magistrate: All right.

Q. As to—as the summons calls for all the files in the possession of Mr. Thomas—is that correct?

A. I assume you are stating it correctly, yes.

Q. You are not sure what the Summons calls for?

A. Well, I don't have it right in front of me.

The Magistrate: I will show the witness the Summons that I have attached to the Petition.

A. Yes. I says, "All files relative to the investigation conducted under the supervision of Gerard Thomas."

Q. And the Company has turned over to you as a result, has it not, the files that are associated with the branch operations of the Upjohn Company as they have been defined to you?

A. I know that the Company has turned over some documents relating to the branch operations, and those documents, I would assume are part of the files that he would have assembled in his investigation.

Q. And they are the documentation showing the amounts of the identified questionable payments, the back-up documents, the checks, et cetera, so that you can total them and see whether they do or do not compare with the amount that the Company has said were made in those countries, is that correct?

A. Yes, sir.

Q. And have you compared those amounts?

A. Compared them with what?

Q. The amounts that the Company says it made in those countries?

A. You mean compared the source documentation and the schedule?

Q. Yes.

A. That they supplied?

Q. Yes.

A. Yes.

Q. And they totaled together to your satisfaction, do they not?

A. The schedule they supplied me agrees with the source documentation.

Q. And the source documentation includes cancelled

checks, vouchers, advices, et cetera, is that correct?

A. Yes.

Q. And the items that to your knowledge are not being furnished to you are, one, Mr. Thomas' notes of interviews of officers of the Corporation, is that correct?

A. Yes, sir.

Q. And questionnaires that were sent to officers of the Corporation, is that correct?

A. Yes.

Q. And the back-up material similar to what you have, vouchers, checks, et cetera, of entities that it is the Company's position do not affect the U.S. Tax Return, with one exception that I will come to in a minute, is that correct?

A. That's correct.

Q. As to the——

The Magistrate: There is our fire drill. We do not use the elevators. There is a stairway right outside the courtroom, and it is six flights down. Take a short recess.

(A recess was had due to a fire drill.)

The Magistrate: We are in session. Mr. Roberts, you may proceed.

By Mr. Roberts:

Q. You know, Mr. Nowak, the years you said were covered by your investigation, I believe you said were '72, '73, and '74, is that correct?

A. Yes, sir.

Q. And covered by the summons, or is the summons really broader than the years covered by your investigation? I would ask you to look at the Summons.

A. The Summons indicates at the top that the years under investigation are 1972, 1973, and 1974, and the body of the Summons requests the investigative files covering the period January 1, 1971, and—it doesn't have an ending date in the body of the Summons.

Q. Now as you realize and know from your examination of the documents that had been furnished you, the 8-K that was furnished to the SEC, copies of it, the payments that the Company identified and that you stated amounted to slightly over $4,000,000 cover the years '71 through '75, isn't that correct?

A. Yes, sir; possibly a couple months in 1976, as well.

Q. And is it not true that for the taxable year '75, of which I believe you have seen the return, that the Company's Schedule M, which is an adjustment, the questionable payments, do eliminate those from deduction on the Federal Tax Return, is that not correct?

A. They did schedule——

Mr. Fink: Well, I am going to object only to this extent: The document would obviously speak for itself. I don't have it here. If counsel would tell how much was excluded from the '75 return, I would withdraw my otherwise I believe valid objection.

Mr. Roberts: What I am trying to show, your Honor, is that the Summons is broader than they conceivably could be inquiring about, and I don't believe the amount of the adjustment is pertinent. I think what is pertinent is the fact—and I think this witness can answer the question—that they did Schedule M the questionable payments that affected the U.S. tax return for 1975.

The Magistrate: I will take the answer.

A. The revenue agents have told me that some schedule or some questionable payments have been Scheduled M'd, adjusted out.

Q. And those would have been included in the $4,200,000 or .2 figure that you used, is that correct?

A. Yes.

Q. So that for the years that you are interested in, even the total figure is not really 4.2 million, is it?

A. Well, it is, because I was interested, and still am interested in, all those years.

Q. Well, relevant to the tax return for '72, '73, and '74, you may be interested. Maybe I used the wrong term. But the years you are examining and which you are entitled to relevant material, is it not, are '72, '73, and '74?

Mr. Fink: Well, I will object to the assumption that he is entitled only to those years. I am not sure—if counsel is trying to get across the fact that the four million dollar figure that the witness testified to on my direct has admitted questionable payments on the part of Upjohn, go over to the year '75 and possibly into two months of '76, he has that statement.

Mr. Roberts: And back into '71?

Mr. Fink: And back into '71.

So the picture would not be unclear. I was perfectly willing to drop the best evidence objections and others, if he would simply tell us the amounts involved.

The Magistrate: Is that your point, counsel?

Mr. Roberts: My point is that the figure that he has used is much broader than the '72-73-74 figure.

Mr. Fink: I am not going to accept your characterization that the figure is much broader. I am going to accept the characterization—I would be willing to stipulate to the characterization.

Mr. Roberts: I have a witness I will call.

Mr. Fink: All right.

The Magistrate: All right. Let's go ahead.

By Mr. Roberts:

Q. Now as a Special Agent, Mr. Nowak, your function is to investigate for criminal purposes, is it not?

A. That is one of my functions, sir.

Q. And what is the function that is identified in the manual as your function?

A. I don't know, because I don't know exactly what the manual says. I haven't looked at it.

Q. You are not sure that the manual encompasses everything that you say you do in the examinations, is that correct?

A. What I am saying is that I don't know what the manual specifically—how the manual specifically describes the functions of a Special Agent. I know that. . . .

Q. Once you conclude there is no fraud, you get out of the case, is that not correct?

A. Not always. Sometimes a special agent will stay in. If you are talking about any fraud, I think that would be a correct statement. We will stay in a case to assist in establishing the civil fraud penalty, even after we have determined that there are no criminal violations in the case.

Q. Do you know, Mr. Nowak, whether prior to the issuance of a Summons, the Summons and the papers recommending it were forwarded to Washington?

A. I don't know if they were or not.

The Magistrate: What do you mean "Washington"? That is a big city. Do you mean Justice?

Mr. Roberts: The Commissioner. Sent to Washington for approval, your Honor.

Mr. Fink: For the issuance of the Summons?

Mr. Roberts: Yes.

A. I have no knowledge as to whether or not that happened.

Mr. Roberts: I have no further questions, your Honor.

The Magistrate: Thank you, Mr. Roberts.

Anything else of this witness?

Mr. Fink: May I see that Summons?

The Witness: Yes, sir.

REDIRECT EXAMINATION OF DAVID E. NOWAK
BY MR. FINK:

Q. Are you acquainted, Mr. Nowak, with the circumstances of the reason the 870-C, which has been referred to, was not signed on behalf of the Commissioner of Internal Revenue?

A. Yes, sir.

Q. 870-C is, I gather, if not an Exhibit, is attached to Mr. Thomas' affidavit, I believe. Yes, it is attached to Mr. Thomas' affidavit, which is on file with the Court, and bears the date when signed on behalf of the Company.

The Magistrate: It is the last page.

Mr. Fink: Yes. Thank you, your Honor.

Q. Of March 4, 1976. Are you familiar with when Upjohn Company made its disclosure to the securities and Exchange Commission as to these questionable payments, both by domestic and by foreign companies?

A. I know approximately when they made the disclosures.

Q. Do you know approximately when they did—go ahead.

A. It was approximately the end of March, 1976.

Q. So before this document could be signed on behalf of the Commissioner of Internal Revenue, the Company disclosed that its return was not accurate, did it not?

A. They disclosed that it may not be accurate.

Q. Was it as a result of that, that the 870-C was not signed on behalf of the Commission?

Mr. Roberts: If this witness knows, otherwise I would——

The Magistrate: Yes.

Do you know, Witness?

The Witness: I have obtained an understanding as to why it wasn't. To say that I don't know, I would have to ask the person that refused to sign it, I suppose.

The Magistrate: Refused to sign it for whom?

The Witness: For the audit case manager and the revenue agent that was involved in the audit and wrote the referral report.

BY MR. FINK:

Q. When you say "referral report," you mean referral from the revenue agents to the Intelligence Division, is that correct?

A. Yes, that's correct.

The Magistrate: I will take the answer.

A. I have lost track of the question now.

The Magistrate: What was your understanding that you obtained as to why the Commissioner did not sign the 870-C, whatever it is?

The Witness: My understanding was that while it was being considered in the administrative review process, the disclosure by the Upjohn Company was made. It was apparent that there may be some U.S. tax implications, that the return may not be correct, and that the—therefore the civil audit was retained or re-obtained, obtained from the administrative process to determine whether there was any other civil or criminal implications relating to those years.

Q. Now actually, Mr. Roberts has asked you about material furnished to you in connection with your investigation. He indicated that you had been furnished with what I believe he called an 8-K or that you had in your possession an 8-K; do you remember that?

A. I do have that document in my possession now.

Q. Yes. The 8-K is what, a document filed with whom?

A. It was a document that was filed with the Securities and Exchange Commission.

Q. And a copy of it was forwarded over to the Internal Revenue Service, is that correct?

A. Yes.

Q. You have also been furnished with certain schedules, is that correct?

A. Yes.

Q. What do those schedules show as to the so-called questionable payments?

A. You mean how are they set up, the format?

Q. How are they set up?

Mr. Roberts: We submit, your Honor, that the schedules would speak for themselves.

The Magistrate: Are they present? Should they be part of the evidence in this case, or not?

Mr. Fink: If counsel wishes them.

The Magistrate: Well, then why don't we identify them and introduce them.

Mr. Roberts: May I inquire?

(Mr. Roberts conferred with Mr. Fink off the record and out of the Reporter's hearing.)

Mr. Fink: Counsel does not desire these disclosed at this time. Perhaps we could get somewhere over——

The Magistrate: Well, I can't decide this in a vacuum. You keep talking about these things that I have never seen before. I would be helpful if at least I could see them.

Why don't you go ahead and we will see what we can do.

Mr. Fink: All right.

Q. I will hand you something that we will not at this time mark for identification, so that it might refresh. And if I may approach——

The Magistrate: Any objection, counsel, to my looking at this?

Mr. Roberts: No objection, your Honor.

(A document was handed to the Magistrate.)

The Magistrate: All right. Do you want the witness to have this?

Mr. Fink: Yes.

Q. And the witness has before him the document, which we have not marked but which, with permission of counsel also, the Court has been permitted to look at.

These are the schedules referred to?

A. These are, yes, the schedules you have been referring to.

Q. Since the record will not be complete without some description of the schedules, the schedules consist of years, amounts, and companies or countries, is that correct? Give us a brief description of what is before you.

Q. Well, it is an accounting spread sheet type of analysis showing the years in which various payments were made, possible questionable payments, the company that made the payment, and the branch or the geographical location of the operation within the Company that was making the payment. And then it is cross-footed and totaled at the bottom.

The Magistrate: And what are the years covered?

The Witness: The schedule covers the years 1971 through 1976.

The Magistrate: All right.

By Mr. Fink:

Q. Now the first page of that schedule is—has a summary of Company payments by year "(Companies listed are those Companies with U.S. tax implications only)";

is that true of all the attachments, too? You have only been given the . . . .

A. The attachments to this particular schedule are a breakout in greater detail what is summarized on the title which you just read.

Q. Is that correct, then, this schedule deals only with Company—with contributions, payments, illegal bribes made by the Upjohn Company, which they are prepared to concede affect their domestic tax return, is that correct?

A. Well, I don't know if they are prepared to concede that. It may——

Q. No, they have conceded it.

Mr. Roberts: We concede they affect the tax return. We do not concede that they are illegal or not deductible, your Honor.

Mr. Fink: But this schedule, voluminous as it may be, does not include the payments, which are $4,000,000 minus approximately $700,000 for the total period we are talking about?

Mr. Roberts: That is correct.

By Mr. Fink:

Q. Well, then, so far you have been given the schedule of the admitted deductible or non-deductible payments, is that correct?

A. I have been given that schedule.

Q. Yes. So far, have you been given any schedule similar to this, covering the amounts of so-called, what Upjohn calls "non-tax impact questionable payments"?

A. Yes, I have.

Q. You have been. Similar in character to this, or even more schedules?

A. It is similar in character to this but not quite as detailed.

Q. I have it——

A. I believe.

Q. ——showing amounts, is that correct?

A. It shows amounts, and—I would have to see it again before I would say for sure what it shows.

Q. And you have been given at least some cancelled checks, invoices, et cetera, underlying this schedule?

A. Yes, I have

Q. All right. And you did say on cross-examination that you had compared the amounts here with the back-up documents, is that correct?

A. Yes, sir.

Q. Is there any way you can tell from those back-up documents who the ultimate recipient of any bribes, kickbacks, or illegal payments was?

A. No, sir.

I would like to clarify that: I think it is possible that some of the documentation may indicate who the ultimate recipient was, but I have no way of knowing that that person was the ultimate recipient at this time.

Q. Some of the documents may indicate but you have no way of checking, is that right?

A. That's right.

Q. Do you have any way of checking whether there are —were more payments than this made, in perhaps fashions which would not be recorded on the financial records of the Company?

A. I have no documentary evidence available that would allow me to assure myself that this is a complete statement.

Q. Nor has any such been furnished to you?

A. That's correct.

Q. In fact, the schedule and the so-called back-up documentation given to you, consisting mostly of cancelled checks and so forth——

A. Yes, sir.

Q. ——asked you to take at face value Upjohn's only internal investigation, is that correct?

A. It asked me to take at face value the summary of Upjohn's investigation.

Q. All right. You were hopeful to obtain more by our Summons, is that correct?

A. Yes, sir.

Q. I did notice you testified to Mr. Roberts' question that investigation for criminal purposes was one of your functions.

A. Yes.

Q. Does every investigation you conduct prove a criminal—come out that there was in fact a violation of the criminal tax laws?

A. No, sir.

Q. So when you say you are conducting a criminal investigation, what do you mean?

A. I am conducting an investigation to determine if there has possibly been a violation of the Internal Revenue laws or related laws.

Q. I won't go into detail, but have you conducted a number of investigations in your career, ten-year career as a Special Agent?

A. Yes, sir.

Q. What percentage of them, would you say, that resulted in a criminal prosecution?

A. I would say 20 to 25 percent.

Q. Is determination of civil liability an important element in a criminal investigation?

A. Yes, sir.

Q. Explain why.

A. Well, one of the laws that I would normally be investigating would be income tax evasion, which would require the proof of a tax liability along with other things for there to be an evasion, and in some instances, even though the tax liability may not be an item of proof in a criminal case, it goes to the materiality of a potential vio-

lation or prosecution and whether or not the Government or the Internal Revenue Service would consider a possible violation with really criminal material worthy of prosecution.

Q. When the matter—when you entered the investigation—I think we have already more or less established that your '72 and '73 had not been closed because of the disclosure made by Upjohn itself to the SEC—and, incidentally, to the Revenue Service—that then the matter was referred to Intelligence, and the investigation was expanded to cover the year '74, is that correct?

A. Yes, sir.

Q. I believe you testified in response to——

Mr. Roberts: May I have that question and answer again, please.

The Magistrate: Would the Reporter read it back.

(Last question read.)

Q. You understood the question?

A. Yes, I did.

Q. But I think you also agreed with Mr. Roberts, or perhaps agreed with him, that the civil audit of the 1974 return did not commence until January of '74; did I understand you to agree to that?

A. I believe he said that the date January was an approximate. It may have been a couple of months later.

Q. But what did you mean the civil audit of the '74 return at that juncture, what were you talking about?

A. Well, there is a—most large corporations are audited for every tax year, and the strictly civil audit is—Mr. Roberts used the term "covers all issues that the service might be interested in that are on the return being audited. That audit commenced with agents at the Company premises sometime in the end of March, 1976. And before that audit commenced, we held a meeting in Detroit with several representatives of the Upjohn Company and repre-

sentatives of the Service to lay down the groundrules and reach understandings as to the audit that was about to commence and the relationship of the criminal investigation that was still open, to make sure that all parties clearly understood the situation. I don't recall the date of that meeting.

Q. But when you took over the matter in December of 1976, and the tax year 1974 was part of the then investigation going on, that investigation was going on with respect to what aspect of the '74 return?

A. The questionable payments.

Q. Did you have the assistance of a revenue agent in that aspect of the audit of the 1974——

A. Yes, sir.

Q. ——return? So from the very beginning, the 1974 return was under investigation by a revenue agent and a Special Agent, but only with respect to the item of questionable payments, is that correct?

A. Yes.

Mr. Fink: I have nothing further.

RECROSS-EXAMINATION OF DAVID E. NOWAK
BY MR. ROBERTS:

Q. Mr. Nowak, you say the only documentation furnished has been that which the Company has furnished you, re the sensitive payments, is that correct?

A. Yes.

Q. You have filed, I believe in connection with your investigation, some 36 IDR's, which, for purposes of the record, are "Information Document Requests" that are normally served by an agent in the course of his investigation asking for documents, et cetera; is that right?

A. Yes, sir.

Q. And you have been furnished documents that you have requested by IDR's, have you not?

A. Yes.

Q. And with the exception of some recent IDR's that are still being worked on to get the back-up material, has the Company refused to respond to any IDR's?

A. No, except with those exceptions that you have just stated exist.

Q. Well, we have not complied because we are still getting the information together. I mean, you understand——

A. No, I am sorry. I understand that some of them may not be complied with.

Q. May not be complied with?

A. Yes.

Q. There are two, I believe—or, one, that asks for the same type of back-up material for Mexico and Brazil, is that not correct?

A. Yes, sir.

Q. Now, the Company has made available to you for interview, has it not, people who you have asked to interview?

A. Yes, sir.

Q. Has it refused to produce anyone for interview who you have asked to interview?

A. No, sir.

Q. And it has said that it would make available to you for interview any of the officers or employees that you asked for, is that correct?

A. Yes, sir.

Q. And it is true, is it not, that you do plan to go to some of the foreign areas to interview the people who are there, is that correct?

A. That is a possibility, yes.

Q. And you have interviewed approximately how many —strike that. The people who Mr. Thomas interviewed have been identified to you, have they not, either Mr. Thomas or outside counsel working with Mr. Thomas in interrogating and inquiring into this problem? The list of people has been furnished to you, has it not?

A. I have received a list, yes.

Q. And of those he has talked to, you have talked to already, if not exactly, 25, is that not correct?

A. I would be willing to accept your count.

Q. And the others that he interviewed or that were interviewed in conjunction with his injuiry are on your list also, are they not?

A. Yes.

Q. So that everyone who he has interviewed or were interviewed in conjunction with his inquiry that admittedly affected the U. S. Tax Return are in the process of being made available to you at your demand, it that not right?

A. Yes, sir.

Q. Now, did the Company not agree that rather than comply with the summons as to the countries that it contends does not affect the U.S. Tax Return, that they invited the Service to inquire and maybe visit those, take one, two, or more of those countries to satisfy itself that the payments did not affect the U.S. Tax Return?

A. That's not clear. Mr. McNelis and I—may I explain?

The Magistrate: Yes, please do.

A. Mr. McNelis and I had a meeting last week, and he indicated himself he was unclear as to whether such a commitment had been made, because we were discussing IDR's that hadn't been filled. And I don't know what the Company's position is at this time.

Q. We will let you go anywhere, will we not, and inquire, and this is what we have said we would do. The question is—whether I believe that you have with Mr. McNelis—is whether we will bring back here the back-up materials, is it not; it is not whether we will let you go to Brazil and Mexico and talk to our people?

Mr. Fink: The question is whether the Governments of Brazil, Mexico, Switzerland, Philippines, et cetera, would permit it, even assuming the budget of the Revenue Service could bear such a——

The Magistrate: Let me clarify something at this point, and I think it is pertinent: Do I understand that you refused to release the questionnaires with the answers that Mr. Thomas sent out to the Service? Do you not want to release those questionnaires?

Mr. Roberts: We are producing the questionnaires.

The Magistrate: Do I understand, though, that if they went to a particular employee who filled out the questionnaire, and asked for his copy of it, you would not object to that?

Mr. Roberts: I am not sure he has a copy and I assume that's if they interrogated him and wanted the copy, that he might have to produce it, your Honor. We have not been faced with this situation——

The Magistrate: Do you know whether these people do have copies of the questionnaries that they completed and submitted to defense counsel?

Mr. Gerard Thomas: I do not.

The Magistrate: Okay.

By Mr. Roberts:

Q. The people who you have interrogated, the 25 already, did you ask any of them for copies of the questionnaires or their answers thereto?

A. Indirectly, for sure.

Q. In the questions that you asked them, did you ask them, either Dr. Partisetti, who is the Chief Executive Officer of Italy who was in this country and was made available to you for examination, did you ask him for copies of the questionnaire?

Mr. Fink: Well, I am going to object to that, because——

The Magistrate: Well, I would like to hear the answer to that. I think I want to see where we are going here.

State your objection for the record. I am sorry.

Mr. Fink: Well, my objection for the record, your Honor, is there was a transcript made of that particular interview recorded just as it is here. It was a question and answer under oath. Mr. Roberts was present.

The Magistrate: Well, all right.

Mr. Fink: And the transcript itself will speak best for what Mr. Nowak was permitted to ask.

The Magistrate: If Mr. Nowak knows the answer to the question, I would like to have it.

A. I did not specifically ask him for the questionnaire.

Q. And, Mr. Bob Casler, the Manager in Hong Kong, was here and made available to you for questioning, was he not?

A. Yes, he was.

Q. And did you ask him for a copy or whether he had a copy of the questionnaire?

A. No, I didn't.

Mr. Roberts: I have no further questions.

The Magistrate: Mr. Roberts, if he had a copy, would the Company object to releasing it through the particular officer?

Mr. Roberts: If the individual had no objection, I don't believe we would.

The Magistrate: Why would he have an objection?

Mr. Roberts: Well, I assume that he probably would not. I don't know whether he would or not. I am not confident at all—and I don't know—the Company cannot make the individuals testify. I am not even sure that some of them will testify.

The Magistrate: Okay.

Mr. Roberts: They are being made available for whatever questions, and we are not going to advise them—I will say this: We will not advise them not to cooperate, but I think this is a question that they have to answer in view of their own laws as to whether or not they want to answer certain type questions.

The Magistrate: They could possibly incriminate themselves under the local laws in that country?

Mr. Roberts: Yes.

The Magistrate: I see. Counsel, do you have some more questions?

REDIRECT EXAMINATION OF DAVID E. NOWAK
BY MR. FINK:

Q. Mr. Nowak, at any point in this deposition or interview of the Italian gentleman, Mr. ——

A. Partisetti?

Q. ——Partisetti.

Q. Partisetti. Did Mr. Roberts stop you from any lines of inquiry?

A. Yes, sir, he did.

Q. Do you recall what lines of inquiry he asked you not to go into?

A. Into the specific area of the questionable payments made by the controlled foreign corporations that Mr. Partisetti was responsible for.

Q. So if Dr. Partisetti or Mr. Partisetti had been more candid in his office or in his questionnaire response to Mr. Thomas, that is information you were not permitted to get at his deposition, isn't that correct?

A. Yes, sir.

Q. Would the same thing be true of your deposition or your inquiries into—with Mr. Casler, the other gentleman named?

A. Yes, sir.

When you say would the same thing be true, you mean do I believe I would have been stopped?

Q. First of all, did you endeavor to go into that line of inquiry?

A. No, I didn't.

Q. Why did you not go into that line of inquiry?

A. After the interview with Mr. Partisetti, Mr. Roberts, Mr. McNelis, and myself had a meeting, and they indicated that their position was at this time that they were not going to allow me to interview these witnesses, specifically, for details of the transactions involved in those situations where they say there is no U. S. tax impact, until this summons' situation was solved. So there was no point in me interviewing any other witnesses in this regard, because I knew he would object. He indicated he would.

Q. You understood the ground rules under which you were then being permitted to operate, is that correct?

A. Yes.

Q. All right. Mr. Roberts asked you on his recross if the Company had offered to make available to you all the individuals listed on that interview sheet who were—with respect to the questionable payments, which they admitted affected their income tax return, is that correct, is that what he asked you and what you answered? That is what I understood.

A. I am not sure that I understand what you are just asking.

Q. All right. I understood him to have asked you, and you responded yes, whether they had not agreed to make available to you all the individuals on the questionnaire, to the extent that those individuals might have information with respect to those payments which the Company admitted affected their domestic tax—Federal income tax returns, is that correct?

A. Could you read that back?

Q. All right. Did they offer to make everyone available to you, is what I am asking? I did not get the import of your question—or, I understood him to limit it.

A. Yes. My understanding was they would make everyone available to me, but they won't allow me to ask every question I want.

Q. Okay. I guess we have that straight.

Mr. Fink: May I have just a moment, your Honor?

I have nothing further.

Mr. Roberts: The only thing—I would like to clarify one point.

RECROSS-EXAMINATION OF DAVID E. NOWAK
BY MR. ROBERTS:

Q. Mr. Nowak, you do concede, I believe, or state—maybe a better way of putting it rather than "concede"—that you are not limited to inquiring into any entity that affects the U.S. Tax Return?

Mr. Fink: Well——

Q. Or that the Company says affects the U.S. Tax Return?

Mr. Fink: All right. "That the Company says affects."

A. I have not as of this date encountered any limitations being placed on that.

Q. And have we not stated that if you can show us or if the Service can show us, and told this to the International man, I think in your presence, that if the Service would show us how these payments, made by a non part of the consolidated return, would affect the tax return, we would make them available?

A. I don't believe you have ever told me that, and I believe that the position you took when you interviewed Mr. Partisetti was that you had already made that determination and wouldn't listen to my arguments.

Q. Now, Mr. Nowak, you have reviewed each of the IDR's issued by the other agents in this case, have you not?

A. No.

Q. Your name is on them. You have not reviewed them, though?

A. No, I don't review all the IDR's that are submitted.

Q. You are not aware, or are you aware, of an IDR that was issued by the International Specialist asking for the Company's statement as to why or, one, what it based its position that these payments by entities not within the consolidated return or not within a U.S. Tax Return affected, would not affect the tax return?

A. I know he made such a request, yes.

Q. And you know the Company answered that, do you not?

A. Yes, sir.

Q. And do you know whether or not he accepted that?

A. I think he still has an IDR that hasn't been filled that he is waiting for a response on before he makes a final determination.

Q. But he has not indicated to the Company otherwise, is that right? You say he has another IDR?

A. I think he, in effect, has, because he still has an IDR that hasn't been filled.

Mr. Roberts: I have no further questions.

Mr. Fink: Nothing further.

The Magistrate: Okay. You may step down. Thank you.

How about a short recess at this point?

Mr. Roberts: Sure.

The Magistrate: About ten minutes.

(A recess was taken at 3:05 p.m.)

Mr. Fink: Your Honor, I trust that I may recall Mr. Nowak to the stand for what will be no more than two or three omitted questions.

The Magistrate: We will see if it is two or three, or not.

All right. Mr. Nowak.

(David E. Nowak resumed the stand and testified further as follows:)

FURTHER REDIRECT EXAMINATION OF DAVID E. NOWAK
BY MR. FINK:

Q. Mr. Nowak, you have been sworn, of course.

Some comment has been made about the years '71 and '75 with respect to this Summons. Would you briefly explain the relevance and necessity for those documents and the other information sought with respect to your investigation, which is currently for '72 through '74?

A. Well, in relation to 1975, the fact that there has been a Schedule M adjustment indicates that there is an item that the Internal Revenue Service ought to check to make sure the adjustment has been treated properly. And, in addition, the Government's position, the Internal Revenue Service's position has always been clearly stated that while the investigation covered the years 1972 through 1974 we were not precluded in opening up going into the 1975 were we to find indications of possible criminal or civil ramifications in these payments.

And in regard—we could also have the option of going back to 1971, if we wanted to.

Another possible relevancy for that material, especially 1971, is the possibility of transactions occurring in one year and not being recorded on the books and records of the Company in that year, but for various reasons, through error or otherwise being recorded in another year, so we would have to make sure that transactions were properly reflected in the year that they occurred.

Q. Insofar as you know, the Summons was drawn by someone else, is that correct?

A. Yes, sir.

Q. Not by you. And it was drawn, was it not, with the knowledge that Upjohn Company had made revelations to the SEC which covered the period '71 through '75?

Mr. Roberts: If your Honor please, as the agent who issued the Summons is in the Courtroom, I believe he is the better person to answer these questions.

Mr. Fink: It is Mr. Rogowski.

The Magistrate: He is here?

Mr. Fink: He is here.

The Magistrate: Why don't we pursue it with him, then, counsel.

Mr. Fink: Well, I hadn't proposed to put him on, but, if necessary.

The Magistrate: All right.

Mr. Fink: All right. I have nothing further.

Mr. Roberts: I have no further questions.

The Magistrate: Okay.

Mr. Fink: Nothing further. You may step down.

I will put Mr. Rogowski on for that limited purpose, your Honor.

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**James M. Rogowski,**

called as a witness by the Petitioners, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. FINK:

Q. State your full name, please?

A. James Rogowski.

Q. What is your employment, Mr. Rogowski?

A. I am a Special Agent with the Intelligence Division of the Internal Revenue Service.

Q. Where are you stationed?

A. Detroit, Michigan.

Q. What is your education?

A. I have a Bachelor's Degree from the University of Michigan.

Q. How long have you served as a special agent?

A. Probably eight years.

Q. You were the special agent who issued the Summons which we are dealing with in this proceeding?

A. I am.

Q. The language of the Summons is yours; you drafted it?

A. I drafted the Summons.

Q. Alone or in consultation with someone else?

A. The——

Q. I will hand you a copy of the Summons, with permission of the Court.

The Magistrate: Yes.

A. I drafted the Summons subject to the approval of my group manager.

Q. At the time you drafted this Summons, were you aware of an investigation that had been conducted by the Upjohn Company, the results of which—or, at least the summary results of which had been turned over to them by the Securities and Exchange Commission?

A. Yes, I was.

Q. Were you aware at the time you drafted that Summons of the years covered by their report of that investigation?

A. Yes, I was.

Q. What are those years?

A. January 1, 1971, through the first two or three months of 1976.

Q. Had you been advised by Upjohn Company that they would not furnish you with various questionnaires and other items which had, presumably, gone into that report, without your taking legal action?

A. I was.

Q. Did you draft that Summons in the light of that knowledge?

A. Yes, I did.

Q. Where did you get the language that you used, as best you now recollect?

A. The language I used came from either the 8-K or an amended 8-K, or possibly some other correspondence that Upjohn submitted to the Securities and Exchange Commission. And this is the language that Upjohn Company used in describing Mr. Thomas' investigation.

Q. And your Summons was designed to get Mr. Thomas' investigation, is that correct?

A. Yes, it was.

Q. In its entirety?

A. Yes, sir.

Mr. Fink: I have nothing further.

CROSS-EXAMINATION OF JAMES M. ROGOWSKI
BY MR. ROBERTS:

Q. Mr. Rogowski, you said, I believe, that the Summons was approved by your group supervisor, is that correct?

A. Yes, sir.

Q. Was it approved by anyone above your group supervisor?

A. I consulted with our regional counsel before I issued the Summons.

Q. Do you know whether or not approval was obtained from the Chief Counsel or Chief of Audit in Washington, D.C., of the Service?

A. Our Regional Counsel may have consulted with somebody in Washington. I don't have any direct knowledge of this.

Q. Do you know whether he did or not?

A. It is possible.

Q. Possible, but you do not know one way or the other, is that correct?

Mr. Fink: The witness has so testified.

Mr. Roberts: That is right.

I have no further questions.

The Magistrate: You may step down. Thank you.

Mr. Fink: Your Honor, in our view we have established a prima facie case for enforcement of the Summons, having met the requirements of, I guess it is Donaldson, one, the procedural regularity of the Summons was admitted before we came to Court; two, the information we seek is necessary to the investigation, relevant to the investigation; and the information that we seek, the data we seek is not—and the various documentation we seek by the Summons is not in the possession of the Special Agent at this time.

My understanding is that Respondents now propose to take on what we would call their heavy burden of establishing affirmative deefnses to the Summons.

So on the assumption that we have made a prima facie case, your Honor, I rest.

(The Petitioners rested.)

The Magistrate: All right. Mr. Roberts, whatever your burden is, do you want to assume it?

Mr. Roberts: I beg your pardon?

The Magistrate: Whatever your burden is, do you want to assume it, and we will proceed.

Mr. Roberts: Yes.

Mr. Thomas.

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**Gerard Thomas,**

a Respondent herein, called as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. ROBERTS:

Q. Will you state your name and address for the record, please, Mr. Thomas?

A. I am Gerard Thomas, G-e-r-a-r-d, Thomas. I reside at 1558 Spruce Drive in Kalamazoo, Michigan.

Q. And are you an attorney, sir?

A. Yes.

Q. And what Bars are you a member of?

A. I am admitted in New York State and Michigan.

Q. And how long have you been general counsel of the Upjohn Company?

A. 1961.

Q. And when did you first become employed as an attorney for the Upjohn Company?

A. In October 1956.

Q. And as General Counsel of the Company, are you called upon to give legal advice to subsidiaries of the Company as well as just to the parent company?

A. Yes.

Q. Mr. Thomas, when did you first become aware that the Upjohn Company might be involved in what has been referred to as "questionable payments"?

A. In January 1976.

Q. And prior to this time did you have any knowledge or belief that the Company might be involved in making what has been referred to as "questionable payments"?

A. No.

Q. Now, will you identify or define for the Court and for the record what you intended and what you included in the term "questionable payments"?

Mr. Fink: So that we will be clear, "included" at what time in his answer to your quetsion just now, or on some other occasion?

Mr. Roberts: In his filing with the SEC.

Mr. Fink: All right.

Mr. Roberts: And what has been described as questionable payments by him consistently, by him since he first became aware that there might be questionable payments. I am trying to get the definition, the framework——

A. Right.

The Magistrate: All right. You may answer.

A. Yes. "Questionable payments" are payments made by or on behalf of the Company or its subsidiaries, which were made to third parties or to Government employees under circumstances indicating that they might be for improper purposes.

Q. And under circumstances, what do you mean by that, Mr. Thomas?

A. Let me comment on this a little bit, because it is a difficult question as you get into it.

In many foreign countries, payments are made to various agents, commission men, influence people, to obtain business, to obtain Government permission, sometimes permis-

sions which you are completely entitled to, no question about. These people represent that they can get you this business or this kind of treatment, and as you investigate and dig into them, there are circumstances around some of these payments which create the suspicion that all or part of this money went on to Government people. In fact, most of these payments, the vast majority of them were made not to Government employees, but to third parties, to citizens. And it is a difficult subject.

Q. Now as a result of being informed that the Company was possibly involved in the making of questionable payments, what did you, as General Counsel of the Company, do?

A. Well, as soon as we got information in one country that suggested this possibility, it became obvious that we had to—or, I had to determine what the true facts were. They're difficult to get hold of, and without these facts, it was impossible for me to give legal advice to the Company, to counsel as its attorney. So I had to get the information upon which I could base my legal opinion and legal advice and get it as accurately, completely, and promptly as I could.

Mr. Fink: Your Honor, since Mr. Thomas wears several hats, I am certainly not going to interrupt the flow of the conversation, but obviously it may become important at some time for your Honor to decide whether Mr. Thomas was acting in his capacity as General Counsel for the purpose of giving legal advice, or in some other capacity. The fact that I don't object at various times during the direct examination or the responses to their own characterization of his position, I trust will not be held against us.

The Magistrate: It won't. Why don't you just make your point on your cross, of course.

Mr. Fink: Sure. I just didn't want to make the assumption that it was permitted without our objection on direct to bother things.

The Magistrate: All right.

BY MR. ROBERTS:

Q. Mr. Thomas, before we go on, will you, for the record, state your full title in the Company?

A. I am Vice President, Secretary, and General Counsel, and also a member of the Board of Directors of the Upjohn Company, which is the parent company. Obviously Upjohn is an affiliation of literally dozens of U.S. and foreign companies.

Q. Now, in this inquiry that you were conducting, what was the purpose of the inquiry?

A. As I stated before, to gather accurately the information on which I, as general counsel, could give my opinion and my advice and guidance to the Company.

Q. And did you consult with outside counsel prior to undertaking any inquiry?

A. Yes, I did.

Q. And what course of action did outside counsel recommend to you, Mr. Thomas?

A. They really recommended two things: First, that it was necessary to gather this information to get as complete factual basis as we could. And we also discussed whether this investigation or this gathering of information was better conducted by me or by the outside counsel, and they recommended that it be—the information be gathered by me with their assistance.

Q. And what recommendations did you make to the Chairman of the Board of the Upjohn Company?

A. Essentially the same recommendation.

Q. And did he approve this recommendation or did the Board approve it?

A. Both did.

Q. Did outside counsel assist you in the inquiry that you conducted?

A. Yes.

Q. Did they assist you in formulating your recommended course of legal action?

A. Yes, they did.

Q. And did you recommend courses of legal action to the Company?

A. Yes.

Q. What type of legal entities does the Company have overseas?

A. Well, let's start with the Upjohn Company, which is the parent company. That in turn owns U.S. subsidiaries and foreign subsidiaries, and there are subsidiaries of subsidiaries. So there are these first and second level of subsidiaries overseas, and also some of the subsidiaries have branches overseas. Most of these organizations are completely owned by the Upjohn Company one hundred percent, although in some instances there are affiliated companies of which we are not one hundred percent owners.

Q. Directing your attention to the first notes you made of conversations with the officers that you contacted, what was the position in the organization outside the United States of the officer or officers who you contacted?

A. Well, in our foreign operations, the Chief Officer or the head man has different titles: Managing Director somewhere, General Manager somewhere, but in each instance I went to our chief—the chief official in that subsidiary or that legal entity.

Q. And it is these notes of these conversations with the Chief Executive Officer of the subsidiary that we are talking about that have not been turned over to the Service, is that correct?

A. Yes.

Q. And in these interviews, were they conducted by telephone, or personally, or both?

A. Both.

Q. And which country or which areas did you personally visit as opposed to contact by telephone?

A. The foreign countries in which I conducted interviews were Brazil, South Africa, Kenya, Japan, Korea, Hong Kong, Indonesia, and Australia.

Q. And where outside counsel did the interviewing, do you know whether it was done by visits or by telephone?

A. I think it was done on a face-to-face basis. There may have been phone conversations, but I cannot recall.

Q. Are the written notes that you made or that the outside counsel made, to your knowledge, verbatim transcripts of the conversation that you had?

A. They are not. In no case did we have a recorder or a reporter recording device, and obviously it would be impossible for me or for outside counsel to have made verbatim notes of those interviews.

Q. And what do your notes contain, basically, without going into the details of any particular one, but in general, what do they contain?

A. My notes would contain what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere. They were more than just a verbatim report of my conversation with the—a report of my conversation in the interviews.

Q. Have your notes of your interviews or the answers to the questionnaires been furnished to other persons, other than counsel, either yourself or people within your organization, as counsel or outside counsel?

A. They have been provided to outside counsel. They have been provided to no one else within the Upjohn Company or any of its affiliated people. In fact, the only people, except myself, that have seen them are some outside counsel.

Q. Now who prepared the questionnaire that was sent out, Mr. Thomas?

A. It was prepared by me and by attorneys with the law firm of Covington and Burling. We worked together.

Q. Was a questionnaire sent to all persons whom you interviewed, either by person or by telephone?

A. I believe that I interviewed all the people who received questionnaires. I interviewed some other people, in addition.

Q. After the interviewing and the results and the answers to the questionnaires came back, did you consult with outside counsel as to the proper legal steps for the Company to take?

A. Yes.

Q. And did you arrive at legal steps that the Company should take?

A. Yes.

Q. And are you aware of whether or not the Company has agreed to make these chief operating officers or chief executive officers available for questioning to the IRS as it pertains to entities that do affect the U.S. Tax Return?

A. Yes, we have and will.

Q. Now, the Petitioner has used the phrase "slush funds," questionable payments in connection with slush funds and off Company—I think it is "off record"——

A. "Off book," is it?

Q. I have got it right here. It refers to off the books in quotes, "slush funds." In your investigation, inquiry or questionnaire, did you find any off the book accounts reviewed?

A. No.

Q. Would you explain what your understanding is in your conversation with people what is a slush fund?

A. Let me——

Mr. Fink: Well, I am going to object. I am not sure what his conversations with other people, unidentified, are. Are we getting at the skill with which he conducted his investigation?

Mr. Roberts: I am getting at what his knowledge. The enforcement in—the brief in support of the enforcement

says that "Upjohn's investigation revealed that its foreign and domestic subsidiaries had made over $4,000,000 in illegal bribes, kickbacks and other payments to foreign Government employees and foreign nationals in thirty countries through 'off the books' slush funds." I don't think that is a correct statement by any means of what the Upjohn Company's investigation disclosed.

The Magistrate: Whose brief are you reading from; the Government's brief?

Mr. Roberts: I am reading from the Petitioners' Brief in Support of their Petition to enforce an Internal Revenue Service Summons.

The Magistrate: Let's see what he considers "slush funds."

He may answer.

A. Yes, I think that is a good question.

I consider a slush fund to be a fund of money, usually in cash, usually off the books, that a company generates for improper or illegal purposes. And I think it attained much notariety and probably is best known as the device by which corporations generated funds by which they could make illegal political contributions in the U.S. And I think slush funds to most of us has that kind of connotation. In fact, Upjohn made no U.S. political contributions, and I suppose that is why we object or are bothered by this characterization.

Q. In your inquiry, Mr. Thomas, and interviews and questionnaires, did you find any slush funds available to any officers of the Corporation?

A. Within the definition that I gave in my understanding of slush funds—and I am not being cautious. It is just that it is a difficult term—I did not.

Q. Now, was this inquiry that you undertook, as a result of an inquiry that the SEC had made to the Company?

A. Not at all. The SEC had not contacted us, had made no inquiry. The undertaking was entirely voluntary and started by us at our instigation.

Q. Now is a company that has registered securities and offers, stock, required by SEC law to make disclosures of this type, if it finds out there are such payments?

A. Yes.

Q. And is that the reason, that you were legally required to make the disclosure that you did to the SEC, that you made it?

A. Yes.

Q. And at the same time you made the disclosure to the SEC, you sent a copy thereof to the IRS, is that correct, or——

A. Very close.

Q. Maybe not the same time, but contemporaneous with?

A. Yes. It might have been the same day. I just don't remember.

Q. Were any of the interview notes or questionnaires submitted to the SEC?

A. No.

Q. What standard did you use in determining what amounts you would include in the disclosure to the SEC, Mr. Thomas?

A. Well, as I stated earlier, it is very difficult to determine whether a particular payment is a perfectly proper commission to a third party or it is really a payment to a third party that is going to go to a Government official. We felt that in the interest of fairness and protecting the Company interest and complying with the law, it was desirable to err in the direction of including payments, some of which I am sure did not go to Government officials, I am sure were perfectly proper payments but there was something in the background that troubled us.

Q. I believe you may have answered this, and I will take an objection to repetition if it is so, but is it not—is it your function, as General Counsel of the Upjohn Company, to also serve as General Counsel to the subsidiaries?

A. As I have stated earlier, Upjohn is a group of probably fifty corporations, and I am in fact the Chief Lawyer for all of those organizations.

Mr. Roberts: I have no further questions of Mr. Thomas.

The Magistrate: Just a moment. I think—he may have one more.

Mr. Roberts: Pardon me.

Mr. McNelis: May we have a minute, your Honor?

The Magistrate: Yes.

Mr. McNelis: Thank you.

BY MR. ROBERTS: (Continuing)

Q. Mr. Thomas, one question, and I will ask it in the framework: Are you sufficiently familiar with the tax laws to know which companies would affect the U.S. Tax Return, or is that more the function of your Tax Department?

Mr. Fink: Well, I am going to object to that, in any event, unless we have a large number of premises established as to what the facts are, all of which was the purpose of our Summons.

The Magistrate: I will take the answer to that. If he thinks he is smart enough to answer it, we will let him answer. . .

A. Certainly in this instance after conferring with both inside and outside tax experts, I feel that I am qualified to know that.

Q. And based on your conversations, have you made a determination as to whether or not what type of organizations would affect the U.S. Tax Return?

A. Yes, I have.

Q. In your opinion?

A. In my opinion.

Q. And do any of the controlled foreign corporations, the subsidiaries that are known as "controlled foreign corporations," affect the U.S. Tax Return?

A. No.

Mr. Fink: I am going to object to that, just on the general principle that here Mr. Thomas has recently equipped himself as an expert in the tax laws, by two experts, allegedly, who are not here, by a large number of unsupportable, unproved factual premises as to the nature of this. I would be perfectly prepared to, quote, "let it in for what it is worth," if anyone in the world thought that that was an admissible answer.

The Magistrate: Mr. Fink, he is only expressing his opinion, which may be right or wrong——

Mr. Fink: I hate to have to be in the trouble of cross examining him on the subject, your Honor.

The Magistrate: I will let the answer stand. It is his opinion.

Mr. Roberts: I have no further questions.

Mr. Fink: I trust he has not, however, been accepted as a qualified expert in this regard? I understand under the new Federal Rules all they have to do is state an opinion, and then I am going to waste the rest of the afternoon cross-examining him.

The Magistrate: I think that is true. Go ahead.

Mr. Fink: But he is not being accepted or proffered as an expert——

The Magistrate: No, I don't accept his testimony as an expert.

Mr. Fink: All right.

CROSS-EXAMINATION OF GERARD THOMAS
BY MR. FINK:

Q. Mr. Thomas, when did you become a vice president of the Upjohn Company?

A. I was elected Secretary and General Counsel before I became Vice President. I am not sure of the exact date. A year or two later I became a vice president.

Q. Well, let me straighten this out. You went to work for the Upjohn Company as a lawyer in the Legal Department, is that correct?

A. In 1956, yes.

Q. In 1956. At a subsequent time, '61, I believe you said, you were made General Counsel of the Company?

A. I believe I was elected Secretary and General Counsel in '61.

Q. At the same time?

A. Yes.

Q. Are the two jobs thought of as synonymous, Secretary and General Counsel?

A. No, they are two different jobs.

Q. They are two different functions. Briefly, what is the function of the Secretary of the Corporation?

A. Well, I think the duties of the Secretary of any corporation are defined in the corporate law.

Q. Have you read your job description lately?

A. I am afraid not.

Q. Okay. That seems to be a failing of all specialists.

So you don't quite know what the duties are accorded to you in the charter and bylaws, but they are somewhat different from those of being a General Counsel, is that correct?

A. Yes.

Q. You are not engaged in giving legal advice when you are recording minutes and signing the appropriate documents as Secretary, are you?

A. I think it is interesting that most major corporations, the secretary is also an attorney now.

Q. Do you feel when he is functioning as a secretary, though he is functioning, in the large sense, Secretary of a Major Corporation, he is necessarily engaging in his functions as a lawyer?

A. I think sometimes he is.

Q. And sometimes not?

A. Certainly.

Q. As a matter of fact, Mr. Thomas, sometimes we lawyers, when acting, are not acting as lawyers, isn't that correct?

A. Of course.

Q. Even though we have been approached in our professional capacity, we are not acting in the true sense of professionals, isn't that so?

A. I don't understand the question.

Q. Well, not every dealing you have with a client is a—even if a large corporate client—is what we would necessarily call part of the practice of professional responsibility, is it? You might be giving business advice, for example——

A. You might have to pick up a son up at the airport, certainly.

Q. Very frequently we are called upon for such functions, I know.

Now Vice President, when did you become Vice President; very shortly after you were made General Counsel?

A. A couple of years, I think.

Q. Well, did that entail merely a recognition of a greater position for you in the Corporation as General Counsel, or did that entail separate duties?

A. My duties did not change significantly. I think it was some recognition.

Q. Were you put on the Board at that time?

A. Yes.

Q. Though you had not previously been on the Board as General Counsel, is that correct?

A. I had sat at Board meetings as Secretary, so I was a member of the Board.

Q. And how large is your legal staff directly under you as General Counsel in the Upjohn Company?

A. Perhaps 25 persons, perhaps 25 attorneys.

Q. You are now referring to those who would be based here in Kalamazoo?

A. Yes.

Q. Are those 25 all under your immediate supervision as General Counsel?

A. Yes.

Q. Do you have a patent, a group of patent lawyers, for example?

A. I am including in my 25 our Patent Department, most of whom are attorneys. There may be three or four that aren't patent attorneys.

Q. So your count of 25 includes the patent——

A. The Patent Department.

Q. The Patent Department. How about those who are non-patent, how many do you have?

A. My numbers aren't going to quite match. About 8 of them.

Q. Okay. Are you an officer or a secertary, which includes officer, or general counsel by election or appointment of any of the subsidiaries?

A. I am an officer of some—of a few of the subsidiaries.

Q. The domestically based, or the foreign subsidiaries?

A. Both.

Q. Do you draw your salary solely from the parent Company here, or do you draw a salary from some of the subsidiaries?

A. My paycheck comes from the parent Company. I am not sure how the allocations are made within the affiliated company.

Q. Or whether there are allocations?

A. Or whether there are allocations, of course.

Q. Do any of the foreign subsidiaries have lawyers on their staff?

A. I think it is important that none of our subsidiaries have a General Counsel.

Q. Do any of them have lawyers on their staff?

A. None of our foreign subsidiaries would have lawyers. One of our U.S. Corporations does have lawyers, one of our U.S. subsidiaries does have lawyers on its staff.

Q. Which U.S. subsidiary is that?

A. Upjohn International, Inc., I believe.

Q. Upjohn International, Inc. I have seen references also to the International Division of Upjohn; is that the same thing?

A. International Division is not a precise term, and International, Inc., would be a part of the International Division, but so would lots of other things.

Q. But International, Inc., has lawyers on its staff, is that correct?

A. Yes.

Q. Though none of them have been titled "General Counsel," is that correct?

A. That's correct.

Q. Actually it was out of the International, Inc., wasn't it, that you got the first inclination of these or the first indication of these questionable payments?

A. Yes.

Q. How did you first get notice of the questionable payments? Who brought it to your attention?

A. Our outside accounting firm.

Q. Which had been engaged in an audit in a foreign country?

A. Yes.

Q. Did they bring it directly to your attention, or did they bring it to the attention of someone else within Upjohn Company?

A. They brought it to my attention as well as some other individuals in Upjohn.

Q. In Upjohn International first, and then to you?

If you don't remember, that is fine.

A. I am not sure. It all happened within a few days.

Q. Within a few days. And this was sometime in January of '76?

A. '76.

Q. That you first got word of this, is that right?

A. Yes.

Q. What immediate step did you take when you first got word of this?

A. I consulted with outside counsel. I discussed the problem with the Chairman of our Board.

Q. You discussed the problem first with the Chairman of the Board, and then with outside counsel, or vice versa?

A. Almost simultaneously.

Q. You can't remember the sequence?

A. No.

Q. Is that correct?

A. Yes.

Q. What outside counsel did you go to?

A. Initially I went to Temko of Covington and Burling.

Q. Why did you go to Mr. Temko of Covington and Burling, what was his particular specialty?

He was an SEC lawyer, wasn't he?

A. No, he really isn't. He is an attorney in a very good firm, whom I have known for a long time and have a high regard for his general good judgment. And I think I suspected that even though he himself was not a specialist in these areas, that his partners would be.

Q. And these areas, you meant the area of SEC?

A. Yes.

Q. Was that on your mind when you went to him?

A. SEC was one of the things, of course.

Q. What else was on your mind?

A. Tax problems, a possible problem in foreign countries, evasion of foreign laws, possible currency restrictions —there were really a whole string of legal problems that flow out of these——

Q. But the one that you had paramount in your mind was SEC when you went to see Mr. Temko?

A. No, I think the primary thing in my mind was the whole problem growing out of a company doing these kind of things, and I think I continued to think of it in terms of that kind of a problem.

Q. All right. But when you went to see Mr. Temko, what suggestions were there then of the SEC problems that were entailed by this discovery?

A. Well, I think in talking with him and his partners, and in view of the publicity about other companies, it appeared that in order of time the SEC problem might be first, because we obviously have an obligation to disclose to the SEC and our stockholders anything that is important.

Q. The publicity in the newspapers and elsewhere and talk about other companies dealt with what aspect of the SEC and its program with respect to these items?

A. The disclosure the companies were making to the SEC, and hence to the public.

Q. And they were making them, were they not, under some sort of assurance or suggestion from the SEC that if you came clean, while you wouldn't get immunity, you might be well treated?

A. That's correct.

Q. So when you started this investigation, in a sense, and went to see Mr. Temko, it was with the understanding, was it not, that there was going to be a disclosure to the SEC?

A. Oh, not at all. I had no idea at this time that the problem was great enough to require an SEC disclosure.

Q. Well, you had enough of an inclination or enough of an indication to know that if you ascertained a larger problem you were going to have to disclose it to the SEC; didn't you know enough at that time to know it?

A. At that time I certainly did not know enough to know that an SEC disclosure would be required. And I think

to be quite candid, we were hopeful that we would not have to make a disclosure.

Q. Why were you hopeful that you would not have to—you were hopeful what, that one episode would not be enough to justify a disclosure?

A. Yes. It was an isolated uncontrolled incident.

Q. But you were certainly going to say if you found out a large series of questionable payments, some of which you have candidly suggested might well be illegal, you were going to have to make a disclosure, weren't you? You intended to make a disclosure, you wanted to come clean, didn't you, with the SEC?

A. Well, no; we wanted to get the information on which I would make the decision whether there would be a disclosure, what kind there would, how it would be made—all those things.

Q. All right. In January, early January of 1976, you ascertained, you learned of this for the first time, and in March of 1976 you had completed enough of your investigation to have made a disclosure to the SEC, is that correct?

A. Could I just expand on that a little bit?

Q. Well, answer it first. You had completed your investigation sufficiently to enable you to make a disclosure to the SEC; you did make a disclosure, didn't you, in March of '76?

A. Is that the question?

Q. Yes.

A. Did I make a disclosure?

Q. Well, did the Company make a disclosure?

A. Yes, we did. It is a matter of record.

Q. Okay.

A. I guess that is why I don't follow your question.

Q. Well, possibly the question was a little broad.

In January you started your investigation, correct?

A. Yes.

Q. And in March you had made your disclosure to the SEC?

A. In March we made a disclosure to the SEC.

Q. Are you suggesting also you had to make a subsequent disclosure to the SEC, is that why you were hesitating when you answered my question?

A. Well, there are a couple of parts and reasons for my hesitation: One is that shortly before we made the disclosure, we had enough information so that on the basis of that information we, I, together with outside counsel, determined that that information, under the SEC law, required a disclosure.

The second reason for my hesitancy is that we were very careful in that February—or, that March disclosure to tell the public and the SEC that we were continuing to gather information, and that this was not to be read as the final—we didn't want people to think this was the end when we knew it wasn't.

Q. And so you filed an 8-K in March of '76, correct?

A. That's right.

Q. And in July of '76 you filed an amendment to the 8-K, is that correct?

A. That's correct.

Q. And in March—and the July 8-K actually increased the amount of the questionable payments over those which had been reported in March of '76, correct?

A. Correct. The March one implied there would be a later one, but it wasn't coming through.

Q. And you carried through with your disclosure promise in July of '76, is that correct?

A. Yes, sir.

Q. All right. And at—and almost simultaneously in March, you forwarded a copy of that disclosure, 8-K, to the Internal Revenue Service, or at least the Company did, did it not?

A. That's right.

Q. Actually you didn't send that information as General Counsel of the Company, did you? Who did?

A. I certainly approved sending it. I can't remember who actually mailed it.

Didn't I mail it?

Mr. Fink: Did he, Mr. Nath?

A. I think I did. It is a detail.

Q. Yes, it is a detail. I am not sure Mr. Ludlow didn't.

A. He may have.

Q. Yes.

A. I may have instructed him.

Q. Yes.

Mr. Fink: You have seen this letter. I might as well put it in the record.

(Mr. Fink handed Mr. Roberts a letter.)

Mr. Fink: I am not sure that we have marked anything, really, your Honor, as an Exhibit, though we have referred to various things, which I am assuming——

The Magistrate: You haven't, but I have got a note here when this is all over to determine what you want in as Exhibits on both sides.

Mr. Fink: All right. Well, I had assumed, though, we made reference to the Summons which was attached to the Petition, that that certainly should be an Exhibit. It is an Exhibit in the sense of being in the pleadings.

I also assumed that the items attached to Mr. Thomas' affidavit that we made reference to, if we have it all, would be—suppose I just give this a number, Petitioner's 1. Should we——

The Magistrate: Hand it to the Reporter. He will mark it for you.

Mr. Fink: Should we mark it as Petitioner's 1, your Honor, and then add some of the others later?

The Magistrate: All right.

Mr. Fink: I had, frankly, assumed, and perhaps before I rested, offered some of the evidence.

The Magistrate: We are not going to be that technical about it. If we stop talking, the Reporter can mark it as an Exhibit.

(Petitioners' Exhibit Number 1 was marked for identification.)

Mr. Roberts: No objection.

Mr. Fink: We offer, then, Petitioners' Exhibit Number 1, then——

Mr. Roberts: No objection.

The Magistrate: It is admitted.

(Petitioners' Exhibit Number 1 was offered and received in evidence.)

Mr. Fink: —at this time, solely for the purpose of showing that Mr. Ludlow forwarded on to the Internal Revenue Service——

Q. Who is Mr. Ludlow?

A. He is the Treasurer of the Company.

Q. Treasurer of the Company. All right.

Now this investigation that you conducted, between learning of this episode in January of '76 and making your initial report to the Securities and Exchange Commission, was conducted by you, is that correct?

A. Under my direction.

Q. All right. Who actually assisted you in that investigation? You have said yourself and outside counsel. Let's start with internal people. Yourself and who else, between those two guys?

A. I am just—I get confused because it's been going so long.

Q. I see.

A. My impression is that in the first two months, no one else inside the Company, no other employee assisted me except perhaps my secretary may have done some things like that.

Q. I understand. And when you said outside counsel aided you, are you referring to Mr. Temko's firm, Covington and Burling?

A. Yes. And, in fact, they assisted me a great deal, and some of the interviews were conducted by Mr. Temko, a partner in that firm, and Mr. Johnson, an associate in that firm.

Q. Those were the two individuals within that firm who assisted you, is that correct?

A. I also consulted with other members of the firm, but in terms of gathering information, they were the two men who assisted me.

Q. I am now concentrating solely on the factual gathering.

A. Yes.

Q. And you indicate some uncertainty as to whether or not they had conducted any face-to-face interviews or telephone interviews?

A. Oh, they certainly interviewed some of the—when I say I interviewed 85 people, some of those people were interviewed by them rather than by me. I was only hesitating because I can't remember whether they did any by phone. I think not. I think they did it all on a face-to-face basis.

Q. Did they go abroad with you, or on their own?

A. They did not go abroad. However, I think another attorney did make a trip to one foreign country.

Q. Another attorney from Covington and Burling?

A. No. From Lee, Toomey and Kent, our tax counsel.

Q. When did you get Lee, Toomey and Kent involved in this investigation?

A. They are our general tax counsel, and of course they are advised at the very—as soon as we realized this had tax implications.

Q. Yes, but my original recollection of your testimony, Mr. Thomas, is when you approached Mr. Temko, you had numerous ideas in mind, one of which was taxes; you didn't go see your tax counsel at that time, did you?

A. I am sure we did within a day or hours of the same time.

Q. A day or hours of that approach of yours to Mr. Temko?

A. Please give me the question again. I guess I am trying to anticipate it, and I am confused.

Q. All right. In January of '76 you learned that an episode had taken place which suggested to you the possibility of questionable payments by the Upjohn Company's subsidiary, is that correct?

A. Yes.

Q. You said your immediate action after consultation with the Chairman or perhaps simultaneously with consultation with the Chairman of the Board was to go to see Mr. Temko of Covington and Burling?

A. That's right.

Q. Did you go to see him in Washington, D.C.?

A. I talked to him on the phone and I visited him in Washington. Both.

Q. Did you on that same trip to Washington go to Lee, Toomey and Kent, or do you really remember?

A. I am quite certain we contacted Lee, Toomey and Kent within a matter of days. I think on the first trip to Covington and Burling, we visited only at Covington and Burling.

Q. And you turned over or you turned for assistance in this factual investigation to Temko, Mr. Temko and his firm only, is that correct?

A. I am hesitating because I tend to consult with several outside counsel. In this case it is true that for assistance

in gathering the information I turned primarily to them. However, I don't want to leave the impression with you that I consulted only with them. Specifically we consulted with Lee, Toomey and Kent, who are our tax lawyers. And, in fact, Covington and Burling are not generally our SEC lawyers, but Mr. Larry Koerber of McDermott, Will and Emery is our tax lawyer—I mean, our SEC lawyer, and we consulted with him pretty early on, although I don't remember the date.

Q. All right. So as best we are able to recollect now, the factual investigation leading down to the disclosure in March of '76 was conducted by you, Mr. Temko, and one associate from his law firm, is that correct?

A. That is correct.

Q. They did not, however, travel abroad; only you did, is that right?

A. That's correct.

Q. So the interviews they conducted were of people here, is that it, in this country?

A. They were of people in this country, but I think it's important to put on the record that during this period between January and July, many of our foreign-based employees were in Kalamazoo, and as they came to Kalamazoo, we interviewed them. We were anxious to get all the information we could.

Q. And you sent out the questionnaire which is attached to the affdavit that has been filed with the Court as a pleading on your behalf, that is Exhibit 3 to your affidavit, which is on file with the Court, is that correct; do you know the document I am referring to?

A. Yes, I do.

Q. That is the questionnaire we have referred to, to which you received the answers?

A. Yes.

Q. That letter went out over the signature of the Chairman of the Board, Mr. Parfet, is that correct?

A. Yes.

Q. And you got responses to that from the people you had selected?

A. Yes.

Q. How good were the responses coming in, how fast were they responding?

A. Very promptly, considering these people were overseas. This was tough information to gather, by and large. In view of a letter from the Chairman, they responded quickly.

Q. And you followed up some of those questionnaire responses with telephone interviews, is that correct? Were they complete when they came in, most of them?

A. Most of them.

Q. Did you have to call some of them up and say you have left something out or you haven't covered this adequately or what is this all about?

A. Yes.

Q. And of those, the so-called notes you were taking, is that what you were doing?

A. Well, no. Some of my interviews were really unrelated to the questionnaire. Some of my interviews were to round out the questionnaire, or the man is a Philippino and I don't understand, he doesn't write English very well. And, so, for instance—I don't like to refer to specific countries. I shouldn't do that—but, for instance, if the man who sent the questionnaire was in in a month, I would sit down and talk to him about it.

And so the interviews were both to round out the questionnaire, but some of the interviews were unconnected with the questionnaire.

Q. Now without pinpointing any given country, did any of the responses indicate that the individual responding had himself been a participant in one of these questionable payments?

A. Certainly by inference, and in most cases—in many cases the man had either been a participant or was immediately associated with the participant, perhaps as his boss.

So, the answer is yes.

Q. He might have approved of the action, et cetera?

A. And he might even have done it, yes.

Q. In other instances they were merely reporting what they had learned as a result of their own investigation prompted by your questionnaire, is that right or wrong?

A. That would have been more apt to have happened in the larger subsidiaries.

Q. Do you think it did happen in your perusal of questionnaires?

A. Some of the information and some of the replies was based on—were based on conversations—was information from people other than the one person to whom the questionnaire was directed.

Q. You said at an earlier point in this proceeding while you were a spectator rather than a witness that you don't know whether the people responding kept copies of what they sent in.

A. That's right.

Q. Were they instructed not to keep copies in any way?

A. I believe they received no instructions on this one way or the other.

Q. So they may well have copies or it is conceivable they do not, is that correct?

A. Exactly.

Q. Was anyone to whom you sent a questionnaire not even an employee of the Corporation at the time you sent the questionnaire to them?

A. No.

Q. I hand you a document which has not been marked for identification but is a foreign payments interview list, attached to the affidavit of Gerard Thomas, which is on file in this matter.

Mr. Fink: May I approach the witness, your Honor?

The Magistrate: Sure.

Q. Which says on page 5 at the asterisk: "Where employment has terminated, the termination date is indicated."

Now is this a list of the questionnaire people?

A. No.

Mr. Roberts: Objection—never mind.

Q. What is it?

A. A list of the persons I interviewed.

Q. That you interviewed?

A. Yes; not a list of the persons who received questionnaires.

Q. But a list of the people whom you interviewed while you were abroad?

A. No, not while I was abroad; the persons whom I interviewed.

Q. Some of them here?

A. Yes.

Q. Some of them abroad?

A. Yes.

May I straighten out the confusion?

Q. Go ahead.

A. The question I think we are on is were all of the persons who received the questionnaires employees of the Company. I believe they were.

Q. You believe they were. Let's be sure of that; are you sure?

A. To the best of my recollection.

Q. All right. Now, the next question is——

A. This is a list of the persons whom I interviewed, which is a different list.

Q. Indicating the foreign payments' interview list, is that right?

A. Yes. And that list includes people who were no longer —yes, I would like to look at it, but presumably people who were——

Q. Well, let me give you some, for illustrative purposes: Executive, unclassified, Warren Miller, is he someone located here, or abroad?

A. He is in the United States.

Q. He actually terminated May 31, 1976?

A. But I felt he would have information on this matter, and so I did interview him.

Q. Well, as a matter of fact, when you interviewed him, he may have been an employee of the Company, is that correct; you were conducting your interviews between January and March?

A. No, I think my interviews continued longer than that.

Q. I see. This list of interviews then extends beyond those that you took care of for purposes of the original SEC disclosure, is that right?

A. I can't recall.

Q. I see. Well, let's try another one. Francis Santiago, Vice President, Latin American Division II stationed in Venezuela. March 30—or, rather, May 31, 1973 was his termination of employment?

A. Right.

Q. That is on page 4 of your list?

A. Right.

Q. Do you remember whether your interview of him was conducted while you were there, or if you were there?

A. I wasn't in Venezuela.

Q. Do you remember whether it was conducted before the SEC disclosure of March, 1976? What I am trying to get at, very simply, are you claiming attorney-client privilege with respect to any people you spoke to who were not employees of Upjohn Company or one of its subsidiaries at the time you spoke to them?

A. Well, I think as to a person who's not employed by the Company, although I might claim a work product privilege, I would have difficulty claiming an attorney-client privilege, that's correct.

Q. Are you doing so at this point? Are any of the documents which have been spoken for in the Summons but not yet produced, do they represent interviews conducted by you with either verbatim transcripts or partial transcripts or your own notes of someone who was not employed by either Upjohn or one of its subsidiaries at the time of your interview?

Mr. Roberts: I will ask that Mr. Thomas look at the list, and he can see the dates that these people terminated. It might assist him.

The Magistrate: Why don't you hand the witness the list.

A. And it would be helpful to me, too, for the record, if I knew this is a list that I submitted of people whom I interviewed prior to the SEC filing. Is that what it is? What is this list? It would be helpful.

Q. Well, this list was attached to your affidavit, which has been filed with the Court, and says: "Paragraph 7. The inquiry which I conducted with the assistance of outside counsel, included interviews with 86 top-level management officials of the Company and its affiliates."

A. Thank you.

Q. "Interviews were conducted only with individuals who had over-all supervisory responsibility for the expenditures of a particular branch, subsidiary, division, or other operating unit of the Company, or with individuals who were substantially concerned with such expenditures.

"Eight. I made notes during these interviews. In some instances there were follow-up interviews and telephone conversations with some of the employees, and notes were made of these. These notes and memoranda contain my mental impressions, conclusions, and opinions.

"Nine. A list of each of the persons interviewed is attached hereto as Exhibit 1."

A. Thank you.

Q. Now you can understand my confusion, because I assumed you were attaching that list to say the people you had interviewed in conjunction with outside counsel, and what I assumed was in preparation for the SEC disclosure. You now tell me what with respect to my assumptions?

A. Your assumptions are correct, with one addition: That these people were interviewed not only in relation to the SEC problems, but with all of the other legal problems that might grow out of this.

Q. When do you think this list of interviewees, when did your interviews come to an end?

A. I think that list—I believe that list represents the people interviewed prior to the final filing with the SEC.

Q. In July of 1977—'76?

A. I think so.

Q. In January '76 you heard of the episode, correct?

A. Right, yes.

Q. That triggered this whole affair, right?

A. Yes.

Q. In March, the first filing with the SEC?

A. Yes.

Q. And finally a filing in July of '76, an amended 8-K with the SEC, correct?

A. Yes.

Q. So these interviews that you are referring to and the list attached to your affidavit on file with the Court were accomplished by July of 1976?

A. Yes.

Q. And that did include, did it not, some individuals who were not employees of the Company?

A. Who were ex-employees, that's correct.

Q. All right. Did you feel you were representing the individuals that you interviewed, or merely the Company?

A. Both.

Q. Did you advise any interviewee of a possible conflict of interest between your representation of them and your representation of the Company?

A. No. I may have with some. I think in general, I did not. I believe at this stage I didn't believe there was a conflict between the two.

Q. Did you advise all of the interviewees that some disclosure might be made to the Securities and Exchange Commission?

A. I do not recall.

Q. Did you advise any of the interviewees that a disclosure might be made to the Securities and Exchange Commission?

A. I am hesitating because the interview with these people was that it was confidential that I was gathering the information, and I think at the time I interviewed these people I really didn't know whether there would be a disclosure to the SEC. We were concerned, of course, about the possibility of some disclosure, but we thought, and as the case was, the SEC disclosure was a very general type of disclosure.

Q. Did you go back to any of the interviewees before you disclosed to the SEC, to advise them of the nature of your disclosure?

A. Well, I believe some of the interviewees are the top three or four executive officers of the Company. Obviously I talked to them. Obviously also I did not go to 85 people and say, "Here is the SEC filing we are making."

So I guess the answer is "some."

Q. To the extent then you might have waived any presumed attorney-client privilege between them and yourself, you did not seek their permission to do so, did you, sir?

Mr. Roberts: There has been no suggestion that there has been any waiver, your Honor.

The Witness: I don't think there is.

The Magistrate: I think it is a loaded question.

Mr. Fink: Well, it is cross-examination, your Honor.

The Magistrate: That is true.

Mr. Fink: I said:

Q. To the extent there may have been a waiver, did you not feel that you had to go back and see them with respect to the attorney-client privilege, is that right?

A. I think the disclosure to the SEC was so general that it was not a disclosure of the attorney-client privilege—or, a waiver of the attorney-client privilege.

Q. Did you go down and see the SEC?

A. Yes.

Q. When?

A. I believe twice: Once when we made the initial filing and once when we made the second filing. I think we hand delivered both of those.

Q. Did you go see the SEC before the July filing?

A. I am not sure that—I can't remember whether we went twice or once to the SEC.

Q. Were you accompanied by Mr. Temko when you visited in July of 1976 to the SEC?

A. No.

Q. Did you receive any inquiry from the SEC as to your attitude with respect to disclosure, either in writing or verbally, at any time, either in writing or verbally?

A. I believe there was a verbal discussion with the SEC, and there certainly were public communications of the fact that they would accept rather general disclosures which didn't identify individuals and countries. And I think we talked to them about that during our visit.

Q. Well, now they said they wouldn't require a public disclosure in the form of it being included in your 8-K, is that what you are saying?

A. Well, they also did not want it privately.

Q. SEC never told you that in order to participate in their voluntary disclosure program——

A. Wait.

Q. —that you had to—let me finish my question, sir. The SEC never told you that in order to have the full benefit of their SEC disclosure program you had to be willing to disclose to the Enforcement Division of the SEC the underlying data supporting your 8-K, including the names of the recipients of illegal payments; what do you remember about that?

A. I have not reviewed this prior to coming here, and you are touching a thing—I think at the time of the disclosure, that we had to make some representation. I can't remember—I believe it was in a letter, but it may have been by verbally that we would, if they felt it was necessary, maybe that—that we would make additional disclosures to their Enforcement Division. I believe the practice was and the implication was that they wouldn't press on that, they wouldn't make us do it; but as part of the voluntary program, we had to agree to do that, if they determined that was necessary.

Q. And is it your recollection that you so agreed?

A. Yes. I believe—yes.

Q. Mr. Thomas, the Company hasn't agreed to bring over to this country any individual that Mr. Nowak might want to interview, has it?

A. That' correct.

Q. You have not so agreed?

A. At this time, that's correct.

Q. Based on your own experience, including traveling abroad, it would not be easy for a representative of the United States Government to approach employees of the Upjohn Company abroad with the same facility that you might, isn't that true?

A. I really don't have an opinion on that.

Q. Well, do you know enough of the laws of some of these countries that it might well be an intrusion on their sovereignty for us to send an individual over to interview some of these people?

A. I really am not an authority on the foreign law. I know the IRS does this, and I don't know the details.

Q. Not in every country, is that correct?

A. I don't know.

Q. I see. You do feel that it is easier for you to interview an employee of the Company than it would for us, don't you?

A. I don't know.

Mr. Roberts: Well, your Honor, we have stipulated we would make them available. I don't know why it is any easier for Mr. Thomas to, under those conditions, than it is for their Agent. We will go with them to any of these countries and make the man available right there and then. It is just as easy for them to do it as it is for Mr. Thomas.

Mr. Knack: It just depends how pleasant you are, that is all.

Mr. Roberts: That is right.

Mr. Fink: If pleasantness were a passport, we would—well, I would probably have one in Arabia; but we will be careful on that. Alrightee.

Just a moment, if I may consult with co-counsel.

Mr. Roberts: I might say, if there is any problem, such as Switzerland, which I don't think we have a subsidiary in, we will bring him out of Switzerland. If there is any problem in any country like that, we will bring him to a point nearest to the country to interview him.

BY MR. FINK:

Q. Mr. Thomas, did you ever render any legal opinion in writing to the Chairman of the Board with respect to this item, you personally?

A. My practice is to advise him orally, and I cannot recall any written document.

Q. What legal advice do you believe you rendered to him in this context prior to March, 1976, and with respect to this questionable payment investigation?

Mr. Roberts: Your Honor, I object. I think this is getting into the attorney-client privilege.

The Magistrate: I am sorry; do you want to repeat the question. I was writing. I am sorry.

Mr. Fink: I asked him what legal advice—let me put it this way:

Q. Did you render any legal advice to the Chairman with respect to this investigation after you had completed it?

A. Yes.

Q. What was the nature of that advice?

Mr. Roberts: I object.

May I consult with Mr. Thomas a minute before he answers this question?

The Magistrate: Yes. Any objection, counsel?

Mr. Fink: No.

The Magistrate: All right. Go ahead.

(Mr. Roberts conferred with the witness out of the Reporter's hearing and off the record.)

Mr. Roberts: If Mr. Thomas is not forced to go into detail as to the legal advice, if he may describe generally what the legal advice, what areas it was——

Mr. Fink: I think we have a problem whenever we are talking about disclosure of attorney-client privilege, which goes back to the merits of this action. I can't take that.

The Magistrate: Well, now, I can't decide whether something is privileegd in this unless I know what it is. But if it is privileged, then you shouldn't know about it. So this is the quandary. It usually is accomplished by an in camera disclosure. I don't know whether we want to do that.

Are you satisfied with a general answer at this point, or not?

Mr. Fink: I can't say until I have heard the general answer, your Honor.

The Magistrate: May we have the general answer then?

Mr. Roberts: Yes.

Mr. Fink: Then I will either move to strike it or rest with it.

The Magistrate: Do you understand, Witness, what we are talking about?

The Witness: Yes.

The Magistrate: All right.

A. And I understand that I won't refer to the specific advice, "Do this, don't do this, you should do this," but I think the areas in which legal problems arise and legal counsel is desired, growing out of these payments, are several. I am not sure I can even remember all of them, but a couple that come to mind, one of course we have talked already about, "Does this violate the SEC laws? Are there any actions that you are required to take because of the SEC laws? Are there any obligations, legal obligations to advise your stockholder, the investing public?" That would be just starters in the SEC area. The obvious tax area, "Are there any U.S. Tax Laws that you could be violating? Are there any adjustments that the law requires in your tax return?" There are all sorts of currency controls. These are not important in the U.S., but in foreign countries, there are many currency controls, and these kinds of payments could involve those.

I think another legal area is the—and maybe this is more in the area of potential litigation. Out of these payments, a great many stockholders suits have grown up, and I think it was part of my advice and opinion to the

Company of how we should best act in order to avoid creating situations where stockholders could bring action against us.

I think also—and I don't hold myself out as a foreign attorney, but we may have more foreign than U.S. legal problems growing out of this. And certainly we talked about some of those problems. I think the currency control would be an illustration of that kind of thing. Obviously some of these payments that have been disclosed violate the laws of the foreign countries.

So there are a whole myriad of legal problems that grow out of this.

Q. Mr. Thomas, maybe we can go at it this way: Primarily the investigation that you, and apparently Mr. Temko, to some extent, assisted by his associate, conducted the investigation now as opposed to the advice was factual in character?

A. Oh, no. We were investigating what the law was and——

Q. That is not, however, the questionnaire we are after, is it? The questionnaire was a factual questionnaire, was it not?

A. Of course. I am not sure that my interviews all were, but the questionnaire was certainly factual.

Q. And many of your interviews were, in large part, factual in character, were they not; is that not correct?

A. Yes.

Q. They were, in all candor, sir, the kind of interview you were conducting about accounting matters and off book accounts, if you did such, could just as readily and perhaps with even greater insight have been conducted by an accountant or the accounting department, couldn't it have been?

A. No, I don't really think it could have. And I think that is why the decision was made not to conduct it by the accounting department or accountants. I think really the

decision was whether inside or outside counsel would conduct it.

Q. Why could it not have been conducted, to the extent of its factual nature, by the accounting department?

A. I don't think the accounting department would—see, the purpose of the investigation was to get the information on which I could render legal opinions. I don't think accountants would have known the kind of information I needed to make these legal decisions in all these areas.

Q. Suppose you had never conducted a personal interview but had to be satisfied with merely the responses which had come to Mr. Parfet's letter together with the questionnaire on it?

A. It would have been inadequate. And I think I have to add on to that, not because people were trying to deceive us, but because these are foreign people. They didn't understand, they sometimes didn't have complete records within their country, and you just needed to explore further than the questionnaire.

Q. Do you remember attending a conference with Mr. Roberts and others before this Summons' enforcement act or proceeding was brought?

The Magistrate: When, counsel?

Mr. Fink: In January 11, 1977.

A. Where was that held?

Q. In attendance—that was held in the office of Regional Counsel, Detroit, Michigan. In attendance were Gerard Thomas, Charles McNelis, Richard Roberts, and Staff Assistant Tuttle, and attorneys Thomas Ritter and Richard Witkowski, Group Manager; Joseph Lubbe, and seated here, Special Agent Joseph Nowak.

A. Yes, I remember him attending that.

Q. Do you remember any statement made by you at that conference?

A. Not specifically.

Q. With respect to whether or not you had rendered legal advice to the Chairman of the Board?

A. I can't recall. I may very well have, but I guess I don't remember.

Q. You don't remember any such statement?

A. That isn't to say I didn't make the statement. I just don't remember precisely what was discussed at that.

Q. I hesitate to refresh your recollection on something that —(to the Magistrate) in all candor, your Honor, I may not be able to myself establish, but if I may try, with permission of Counsel:

Did you at any point in that conference state—did you at any point there state that you had rendered no legal opinion or opinion letter to the Board of Directors as to their improper payments?

A. Well, that would be an incorrect—I suppose you are reading—I guess I would like to know what document you are reading from?

The Magistrate: So would I.

Mr. Fink: Well, your Honor, I wouldn't disagree.

Q. I am reading from a document that was not prepared by you.

Mr. Fink: It was prepared by three of the participants in that conference, who are not here, your Honor. I was trying to be candid about the matter, but I am not in a position to have them here.

The Magistrate: Are these Government employees?

Mr. Fink: They are, yes. Mr. Ritter, an attorney; Mr. Witkowski, an attorney; and Mr. Chauncey Tuttle, Jr., an attorney, signed this document.

Mr. McNelis: May we ask when it was prepared, your Honor?

Mr. Fink: Yes. It was prepared, according to the document, on January 19, 1977, with respect to a conference on Tuesday, January 11, 1977.

Mr. McNelis: Is counsel prepared to state whether or not there were any notes or recordings made of the conference he is referring to?

Mr. Fink: Obviously I am not prepared to state it, but I am happy to state that I am not exploring this with the knowledge that there is such a tape recording or not.

I recognized, your Honor, and tried making clear to you, that I had not intended to bring something forward before the Court that I was not prepared to prove.

The Magistrate: Well, ask your question, and if he doesn't remember, I assume he will tell us.

Mr. Fink: Yes.

Q. Did you or did you not make any statement to the effect that you had rendered no legal opinion or opinion letter to the Board of Directors? And I am not in a position, I will tell you very candidly, to disprove you if you say no.

A. No. I would not have made such a statement, because, in fact, I did render legal opinion to both the Board of Directors and to the Chairman.

Perhaps I could clarify this—and maybe this isn't the right thing to do. I may have stated that I couldn't recall any written opinion, but certainly I delivered numerous oral opinions, and I think that may be where the——

Q. Confusion may arise?

A. If I said I didn't render any opinion, that wouldn't be correct.

Q. I am not in a position to say whether you did or didn't. You are recorded as having stated, but it may be no written.

A. Yes.

Q. Would those be recorded, if you delivered them, in the minutes or records, which are really in your possession?

A. No. Our minutes merely report the action taken by the Board.

Q. They would not indicate whether or not you did——
A. They wouldn't cover comments and opinions and things of this nature.

Mr. Fink: May I have a moment?

The Magistrate: Yes.

Do you have any other witnesses, Mr. Roberts?

Mr. Roberts: One.

Mr. McNelis: Are we pushing your Honor on time?

The Magistrate: No, no problem.

Mr. McNelis: Thank you, your Honor.

BY MR. FINK:

Q. Mr. Thomas, I guess I left one thing dangling. The International Division has a legal staff of its own, is that correct?
A. There are lawyers assigned to the International Division just as there are to the Agricultural and Chemical Division. I am the chief lawyer for the whole Company.
Q. And there are lawyers assigned to the International, Incorporated, Corporation—or, Upjohn International, Inc., I guess it is?
A. Yes.
Q. All right. They have a legal staff?
A. Surely.
Q. Did you consult them in connection with this investigation?

Mr. Roberts: May he look at the list of the people he interviewed? There is a name on there.

Q. Well, that would be a factual interview. I meant, did you consult with them with respect to legal matters?
A. Let me take a minute in answering that one.
As I said initially, I consulted primarily with outside counsel and not with people in the Company. I think there

also was a decision that since this problem appeared to be primarily in the International Division, they shouldn't or wouldn't be involved in my gathering the information.

Now I think I did interview some people to get the factual thing, but I think in terms of structuring the investigation—or, the inquiry, the feeling was that it was better conducted by someone not directly assigned to the International Division.

Q. It was best conducted by someone not assigned to the International Division?

Q. It was best conducted by someone not assigned to the International Division; they would normally be more expert, I assume, in International law and in the law in foreign countries than would your parent staff, isn't that correct?

Mr. McNelis: That could be a gratuitous assumption. No foundation.

The Magistrate: Well, I will take the answer.

Are we going to have two counsel talking?

Mr. McNelis: I am sorry, your Honor.

The Magistrate: I don't care, as long as we lay the ground rules here, because——

Mr. McNelis: I will behave, your Honor. I will shut up.

Q. It may have been a gratuitous assumption; is it an accurate assumption, Mr. Thomas?

A. I do not think that the lawyers assigned to our International Division would know more about the legal problems that might be involved in these payments than the lawyers assigned to the parent division.

Q. This legal staff does not report directly to you, even though you are General Counsel; isn't that correct?

A. In that all of the people in International report to the head of International, I certainly have some very direct responsibility for them.

Q. And their expertise was not with respect to these problems that I was inquiring about, but their expertise was with respect to the law of the foreign country in which these payments had been made? They deal with that more regularly than you do, don't they?

A. Well, these are all, of course, United States lawyers, and they would not hold themselves out as being experts on the laws of the foreign countries.

Q. They might not hold themselves out as experts—I suppose none of us would—but they deal with it more often than you do, isn't that so?

A. Yes.

Q. All right. But you did not—these subsidiaries did not turn to them for legal advice in this regard, is that what you are telling us, to the International Division? They have——

A. True.

Q. They have subsidiaries, as well, do they not?

A. State your question. You have got two questions to me.

Q. Yes. Let's get this terminology straight. "International Division," you have indicated, is a broad term which will include within it, International—Upjohn International, Inc.," is that correct?

A. Yes. It really includes our foreign pharmaceutical operations, primarily.

Q. And part of the foreign pharmaceutical operations are subsidiaries owned directly by Upjohn International, Inc., is that correct?

A. No, I think not.

Q. Is that incorrect?

A. Yes.

Q. What does Upjohn International, Inc., do?

A. I think it is a service corporation.

Q. For?

A. For the foreign pharmaceutical operations. I get confused about the names of our subsidiaries, because

there are so many, and I can't identify them without a chart.

Mr. Fink: I don't think we have anything further, your Honor.

The Magistrate: All right. Mr. Roberts.

Mr. Roberts: Your Honor, I have fallen, I guess, into the error that so many of us do now and then, of not introducing documents that I feel are part of the record, because they are attached to the affidavit. But for identification purposes—and I would ask that this be identified as Respondent's Exhibit 1.

The Magistrate: Is that the foreign payments interview list?

Mr. Roberts: Yes, it is, your Honor.

(Respondent's Exhibit Number 1 was marked for identification.)

Mr. Roberts: And this be identified as Respondent's Exhibit 2. It is the letter to the foreign gentlemen and area managers that has been referred to.

For purposes of clarity, it would probably be better if that be numbered number 3, as it is to the affidavit.

(Respondent's Exhibit Number 3 was marked for identification.)

Mr. Roberts: And I would ask that this letter, this document, the letter of Mr. Parfet, the opening "Dear" without the name filled, dated January 16th, be marked for identification purposes as Respondent's Exhibit Number 2, consistent with the Exhibit Number to the affidavit.

(Respondent's Exhibit Number 2 was marked for identification.)

Mr. Roberts: The interview list is covered by a letter to Mr. Nowak. I guess technically it should be marked Exhibit 4.

The Magistrate: This can become very confusing, it seems to me, because we have different numbers here. Why don't we introduce the affidavit of Gerard Thomas——

Mr. Roberts: If I may do so, I will offer the affidavit.

The Magistrate: —with all the attachments. Is there any objection to that?

Mr. Fink: My only objection is that to the extent it be deemed self-serving and not in—I have no objection to its coming in as an affidavit submitted, but I do not wish it taken as his testimony which we have heard from the stand.

The Magistrate: Fine. I understand that, and I think that counsel, the Respondent, understands that.

Mr. Roberts: That is correct.

Mr. Fink: So it comes in with the understanding that it is merely introduced as an affidavit to identify the various Exhibits attached, et cetera, but his testimony is what we have heard?

The Magistrate: All right.

And then the Exhibits attached to the affidavit will be considered as any other Exhibits.

Mr. Roberts: As any other exhibits.

The Magistrate: All right.

Mr. Fink: Yes. I think from time to time we have referred to it as "attached to your affidavit."

The Magistrate: Mr. Reinardy, you can strike all that other marking.

Mr. Roberts: Yes.

(Respondent's Exhibits 1 to 3, which were previously marked for identification, were withdrawn and are retained in the possession of Mr. Roberts.)

REDIRECT EXAMINATION OF GERARD THOMAS
BY MR. ROBERTS:

Q. One further clarifying question. I know he did not do it intentionally; Mr. Fink referred to the list as your list of interviews. For clarification, as I understand that list, it is not only those you interviewed, but those you interviewed during your investigation, which were sometimes interviewed by Mr. Temko and Mr. Johnson?

A. That was a misstatement. Your statement is correct.

Mr. Roberts: I have no further questions.

The Magistrate: All right.

Mr. Fink: Just one.

RECROSS-EXAMINATION OF GERARD THOMAS
BY MR. FINK:

Q. Do you have in your possession all the questionnaires proposed?

A. Yes.

Mr. Roberts: Here today, you mean?

Mr. Fink: No.

The Witness: Oh, not here.

Mr. Roberts: Well, that is why I wanted to make sure.

Q. I just wanted to be sure now you have them all.

A. Yes.

Q. And you have all your notes that were the subject of this Summons?

A. Yes.

Q. Do you have any other investigatorial material that you feel falls within the parameters of the Summons that you now have?

Mr. Roberts: Your Honor, I might explain: There is one thing that I have discussed back and forth with Mr. Thomas as to whether it would be within it, and I tentatively said

no, but I would like to identify it. There are some drafts, as I understand it, of the disclosure to the SEC prior to the actual filing of the SEC. I don't think they come—I think we have furnished everything other than something like that, which culminated in a document that has been furnished. So, other than that, there is only the interviews and the questionnaires, as I understand it.

Mr. Fink: Is all that is now responsive to the subpoena—Summons we have issued; the only thing that is even possibly within its parameters, you tell me, other than what we have talked about, is some preliminary drafts of what was eventually turned in as the 8-K to the Securities and Exchange Commission, is that correct; is that what you are telling me?

Mr. Roberts: That is what I understand.

Is that right, Mr. Thomas?

The Witness: Well, I hesitate. For instance, I think I may have that questionnaire that was finally sent out. There may be some early drafts of that. I think I have some notes of phone calls with Mr. Roberts. I have some documents that were generated last week. It is hard to answer your question, but these don't relate to the investigation.

Mr. Fink: Really I think everybody has understood that this Summons, as of the date it was issued and at the time it was issued, Mr. Rogowski has said that he was aware of an investigation that you had conducted leading up to an SEC disclosure, two of them; and that is really what he was after, plus any additional materials that you might have added thereto in that time period.

The Magistrate: So I understand, early in the proceeding I think Mr. Roberts made reference to there are three categories of information. You have the questionnaires——

Mr. Roberts: The questionnaires.

The Magistrate: Mr. Thomas' notes, et cetera, of his interviews. And what was the third category?

Mr. Roberts: Those were the only two categories—well, the third category, your Honor—you are correct—is the material that he has. I don't know that he has any really that falls within it, of items that do not affect the U.S. Tax Return.

The Magistrate: According to Mr. Thomas.

Mr. Roberts: Yes, that are not part of the consolidated return.

The Magistrate: Which you want?

Mr. Fink: We want. We are not accepting their investigation. We want our own.

The Magistrate: I understand what you are talking about.

Mr. Roberts: Yes. I am not sure that there is any of that in his—is there, Mr. Thomas? Let's get it on the record. The back—any material similar to the back-up material to the payments that were filed by the seven companies that admittedly affected the U.S. Tax Return and that had been turned over to the Service, is any of that material in your files for the other countries?

A. Invoices, that kind of thing?
Q. Yes.
A. No.

The Magistrate: Well, is the Summons directed only to Mr. Thomas, or to Mr. Thomas and the Upjohn Company?

Mr. Fink: It is directed to Upjohn Company. It reads, "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments made to employees," et cetera.

Now if there is such back-up material that was obtained, similar to the other, then of course we would say that it falls within the ambit of the Summons.

The Magistrate: I interpret the Summons as directed to both Mr. Thomas and the Upjohn Company.

Mr. Fink: And the Upjohn Company, that's correct.

The Magistrate: All right. Go ahead.

Mr. Fink: But restricted in character, presumably, not in—only in this sense: That it says, "All files relative to the investigation conducted under the supervision of Mr. Thomas."

Now if that includes back-up material for what they say are countries we don't have to look at and what we say are countries we—if you will forgive the adjective—"We darn well want to look at," we would assume that material we should have.

Mr. Roberts: Your Honor, the Summons is directed to Mr. Thomas. It is not really even directed to the Upjohn Company. I almost raised this as a response to the enforcement proceeding, but decided to let it go, because he is——

Mr. Fink: He is correct in that.

Mr. Roberts: But the Summons is, "Gerard Thomas, Vice President and Secretary of the Upjohn Company."

The Magistrate: Well, now it doesn't say "of the Upjohn Company." As I read it, it is directed to two entities; but I may be wrong.

Mr. Fink: Yes. it says, "Vice President and Secretary." Underneath it says, "The Upjohn Company."

Mr. Roberts: Well, I have never viewed it that way for this reason: I would assume that in these foreign entities that Mr. Thomas called, that they would have a file. I can't believe if I am the Chief Operating Officer of the A-B-C

Company in Argentina, a subsidiary, that I haven't made notes and maybe even dictated. We have not viewed that as coming within the summons whatsoever.

The Magistrate: Well, we won't decide that here today.

Mr. Fink: Obviously not, your Honor, though if there are such material—well, I take it that even if we were to serve a Summons today making it clear that we wanted that material brought over here, et cetera, et cetera, am I correct that we might have a response on behalf of the Upjohn Company, "Oh, no, that is not relevant, because we say it is not relevant." I guess when you decide this we will decide what we will get.

Mr. Roberts: That would be one of the responses, that it is not relevant.

The Magistrate: I assume that it would be, yes.

Mr. Fink: In that case, if your Honor decides we are within the realm of relevancy right now, we can decide how much we will get with respect thereto, I assume.

The Magistrate: Well, are we through with Mr. Thomas?

Mr. Roberts: I am, yes.

Mr. Fink: Yes.

The Magistrate: All right. Thank you, Mr. Thomas.

The Witness: Thank you.

Mr. Roberts: Mr. Creamer.

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**David S. Creamer,**

called as a witness by the Respondents, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. ROBERTS:

Q. Mr. Creamer, for purposes of the record, will you state your name and address, please?

A. My name is David S. Creamer, C-r-e-a-m-e-r, and I reside in Richland, Michigan.

Q. And what is your occupation with the Upjohn Company, sir?

A. I am presently Manager of the Corporate Tax Planning Unit.

Q. And in this Unit, what is your knowledge of the Federal Tax Laws, what is your responsibility re the Federal Tax Laws?

A. Well, two: Certainly advise the Company of all pertinent tax laws with respect to our—doing business in the United States, and certain international responsibilities.

Q. And does the Upjohn Company file what is known as a consolidated return?

A. Yes, they do.

Q. Are any of the—strike "any."

Under the framework of the Federal tax laws, are there what are commonly referred to as "controlled foreign corporations"?

A. Yes.

Q. And do the subsidiaries, some of the subsidiaries of the Upjohn Company, come within the term "controlled foreign corporations"?

A. Yes.

Q. Are you aware of any outstanding IDR issued by the international agent directed to the Upjohn Company that is unanswered, the international revenue agent?

A. No, I am not.

Q. And did the international revenue agent by IDR ask on what basis the Upjohn Company was contending that the controlled foreign corporations did not affect the U.S. Tax Return?

Mr. Fink: Your Honor, I have let this go on for awhile, and I am not sure precisely where we are headed, though we may be headed into an area that I find objectionable. I don't know. Is this gentleman being offered as an expert on tax law, is he being offered for some purported admission that the Revenue Service has made? What exactly——

The Magistrate: I think he is on here because he wants to show that controlled foreign corporations do not involve domestic tax payments, I assume.

Mr. Fink: That would be a problem though of the law that is to be construed, in which case I wonder if this gentleman is being offered as an expert on that subject. So far he hasn't been qualified as one. The line of inquiry so far seems to be, has he submitted something to a revenue officer or an international revenue officer, who is not here. And even, I might add, if such a revenue officer has expressed a legal opinion, after all, that is something eventually for the Commissioner of Internal Revenue, and it is something if somebody disagrees with the Commissioner of Internal Revenue, that we may well try in either a criminal or civil action, but I would certainly not think in a Summons' enforcement procedure.

The Magistrate: Well, you are pretty sure, aren't you, that I don't know what the answer is to this tax question.

Mr. Fink: I am equally sure that conceivably I don't know where we are headed, either.

The Magistrate: I would like some help on it. Can't we have this man testify——

Mr. Fink: Subject to a motion to strike——

The Magistrate: —with the idea that he's not—you know that I will have to eventually—I may have to eventually find out what the law on the subject is. Perhaps he can help us a little bit.

Why don't you qualify him to some extent.

Mr. Roberts: Well, I will qualify him before I ask the question I am going to ask about this, but what I am leading up to now and what I have been asking him about is there has been an outstanding question asked of Mr. Nowak whether there is or has not been an outstanding IDR, and this gentleman, who all IDR's are given to, knows of no outstanding IDR in the international area.

The Magistrate: All right.

Mr. Roberts: And that is the purpose of this line of questioning at this time.

Mr. Fink: An IDR, again, for those of us who are neophytes——

Mr. Roberts: An information document request.

Mr. Fink: Meaning that a request that our man fills out and gives to your Company conveyor belt to see if it comes back down, is that——

Mr. Roberts: Well, if you are referring to Mr. Creamer as the conveyor belt, yes.

Mr. Fink: But it is submitted to him, and he turns to come underling and says, "Will you get that document for me?"

The Magistrate: I will take the answers to the questions on this subject.

Mr. Roberts: Will you read back the question, please.

The Magistrate: If he can find it.

The Reporter: "And did the international revenue agent by IDR ask on what basis the Upjohn Company was contending that the controlled foreign corporations did not affect the U.S. Tax Return?"

Q. Was that the substance of the IDR that was submitted by the international agent?

A. There were two such requests.

Q. And will you explain the two requests, Mr. Creamer, and whether they were each answered?

A. Early in the Internal Revenue Service audit, we were assigned what is referred to as an "international special list," and the case manager of the IRS audit team requested that such international special list request from the Company, as to our opinion as to foreign payments would impact on our U.S. Tax liability. Such request was filled with this international specialist. Shortly after that time another international specialist was assigned to our case, and we got a similar request from him, and, likewise, a response was made in more detail than the original one.

Q. Mr. Creamer, how long have you been involved in the Federal Tax area?

A. Well, I have been with the Upjohn Company 17 years, and I have been in all those years, in one way or the other, been involved in tax matters at the Company.

Q. And what is your educational background, Mr. Creamer?

A. I have a Bachelor's Degree from the Ohio State University, and I attended the University of Michigan Law School.

Q. And in your period now with the Upjohn Company as opposed to the International Division, what have your functions been with that—with the Tax Department of the Upjohn Company?

A. Well, in more recent years, as I suggested earlier, as I said earlier, to advise management of pending tax legislation, the impact that it has on a company, and now—and to review many, many transactions that the Company is involved in, and to advise management of the tax implication thereof.

Q. It is part of your duties to ascertain what entities come within the consolidated U.S. Tax Return?

A. Yes.

Q. Did you assist in preparing the responses that were filed to the two IDR's?

A. Yes, I did.

Q. And did you consult with outside tax counsel in preparing those responses?

A. Yes, I did.

Q. Will you state now what those responses to the IDR's were?

Mr. Fink: Well, I am going to object, your Honor. It seems to me the very best, all this gentleman could be testifying to, when he becomes a conduit for some un-cross examined tax experts here, is that he has got a—the Company has a firm belief that it doesn't have to worry about the tax impact of questionable payments by these companies on its domestic return. I think that has been clear enough the Company so feels.

The Magistrate: Mr. Fink, I am not allowing this testimony because he is an expert in tax law. I think I can have an expert on foreign law advise the Court, but I think I have got to make up my mind, if I have to, what the tax law is; but I do want—he can testify as to why they have refused to honor the subpoena. And apparently one of the grounds is they don't have to on a controlled corporation, and that is why I am allowing the testimony, and I think I will take his answer.

Mr. Fink: All right. With that understanding.

By Mr. Roberts:

Q. Will you answer, Mr. Creamer?

A. Well, as Mr. Thomas indicated in his testimony, the Company transacts business through various corporate legal entities, transacts the foreign business through various corporate legal entities in the foreign areas. One through branches, through foreign branches of U.S. companies; the other method, through—or, foreign subsidiaries, which is commonly referred to in the tax area as "controlled foreign corporations."

The payments and the detail that we have provided to the Government during this investigation involved payments that were made from branches of—from foreign branches of U.S. companies, and such foreign branches are included in the U.S. consolidated return.

Payments made by the controlled foreign corporations by their own monies and made on their own behalf have no impact on our U.S. tax liability. The fact that there are, with one exception, which is referred to as Subpart (f), "Income," no transaction of a foreign subsidiary has any impact on our U.S. tax liability. The U.S. tax liability is triggered when a foreign subsidiary pays a dividend to the U.S. shareholder. The payments that we are referring to here have no such bearing on any type of dividend. Foreign subsidiaries, period, don't come within the U.S. tax jurisdiction.

Q. Now, Mr. Creamer, are you aware of the 1976 Tax Revision Act?

A. I am.

Q. And are you aware of the changes that that act made in this area?

A. Yes, I am.

Q. And it took the Act, did it not, to say that these payments, questionable payments, bribes, kickbacks, et cetera, would be treated as constructive dividends under the '76 Act, is that not correct?

Mr. Fink: Well, I am going to object, with the continued understanding that Mr. Roberts testifies as a legal expert, Mr. Creamer adopts the assertion; and I am not going to be prepared to argue it here, but it is coming in, as I understand it—as I understand it from what your Honor says, "for what it is worth."

The Magistrate: As his opinion of what the tax law is. It is not binding on me, and, frankly, I don't know what the tax law is in this area.

Mr. Fink: I am beginning to wonder whether we do.

The Magistrate: Go ahead and ask your question.

Mr. Roberts: Well, the Court will tell us what the tax law is.

The Magistrate: After the Court finds out.

BY MR. ROBERTS:

Q. How does the '76 Act now treat bribes, other illegal payments made by a controlled foreign corporation overseas?

A. Well, these bribes and illegal payments are provided for in a Section 162(c) of the Internal Revenue Code. The Tax Reform Act of 1976 states that the payments, illegal payments, such as bribes, kickbacks, as defined under Section 162(c) of the Internal Revenue Code, are—such payments made after November 3, 1976, are taxable to the U.S. shareholder. In other words, if—prior to the Reform Act, if a payment, an illegal payment were made in Country X by a foreign subsidiary operating in Country X, such payment would have no bearing or impact on our U.S. Tax Return. The Tax Reform Act of '76 so states that a payment of that nature now would become subject to U.S. Tax.

Q. After the response was made to the IDR to the International expert, were there any further follow-ups from the international expert on these payments?

A. No. I was told by the Case Manager, the Internal Revenue Service Case Manager, Mr. Basiac (spelled phonetically), that the replies to the information document request that was supplied by me was sufficient, and there was no further followup.

Mr. Roberts: I have no further questions.

The Magistrate: Is the '76 Act retroactive at all as far as this issue us concerned?

The Witness: No. As far as this issue is concerned, your Honor, it is effective 30 days after the President signed the bill, which the President signed on October 4.

So as far as this issue is concerned, it is payments made after November 3, 1976.

Mr. Fink: Well, some cross, your Honor, with the understanding I don't think the direct is proper. As long as we are going to try clarifying opinions of the law, I guess we better have it out.

CROSS-EXAMINATION OF DAVID S. CREAMER
BY MR. FINK:

Q. The regulations provide that a controlled foreign corporation is supposed to keep certain records?

A. Yes, sir.

Q. And do the regulations provide that those records are supposed to be made available to any examining agent?

A. Yes.

Q. Even though you would think that you didn't have any reportable subpart (f) income, you are supposed to have records, aren't you, from which the Revenue Service can verify your assertion?

A. Yes.

Mr. Roberts: I might say, your Honor, if such a request is made for the books of account, which is the way the statute reads, they will be provided.

Mr. Fink: "Records," is says.

Mr. Roberts: It says "books of account." Mr. Thomas says "notes of interviews and stuff are not the records of that controlled corporation," and what not; and that is what this law suit is all over, is getting his notes and questionnaire.

Mr. Fink: The sum of the Summons is over having an investigation of the tax affairs of Upjohn Company and

its subsidiaries, whether they are called foreign controlled subsidiaries or not.

The investigation, your Honor, is respectfully one we think should be conducted by the Revenue Service and not decided by Upjohn.

The Magistrate: Let's direct the question to the witness and not to me.

Mr. Fink: Very good.

Q. There are such requirements that there be records and documents made available, and whether or not this so-called "Subpart (f) income," is that not right, reportable subpart (f) income?

A. Yes, sir.

Q. Assuming the following hypothetical—I am not asking you to accuse your Company of anything, but assume the following hypothetical:

That a controlled foreign company located in another country creates an off-book account—do you know what I mean by an Off-book account?

A. Yes.

Q. Not shown on its records, from which is disburses funds in that country for the benefit of its American parent. Would that have a tax impact on the domestic tax return of that parent?

A. In my opinion, yes.

Q. As a constructive dividend?

A. That could be one approach, yes.

Q. One approach.

The Magistrate: Are you talking about one period of time; any time?

Mr. Fink: Any time prior to '76.

The Magistrate: All right. Just so I understand.

Q. Assume another hypothetical. Assume that a parent company selling to a foreign subsidiary, either directly or

indirectly, so sets up its pricing structure that it is really selling to that foreign subsidiary, directly or indirectly, and an artificial price designed to shift profits into that country and keep them away from this country; would that have an impact on the domestic tax return? Could it have an impact?

A. In my opinion, yes.

Q. The Commissioner of Internal Revenue would have numerous devices, would he not, for re-allocating that income?

A. Yes.

Q. Now let's get to the more precise proposition, perhaps, of what was true prior to the Tax Reform Act of 1976. There was debate, was there not, among scholars and others, as to whether or not an illegal payment made in a controlled foreign corporation represented a reduction in the earnings and profits of that corporation?

A. That is a fair statement, yes.

Q. And it is the resolution of that debate, is it not, which determines whether or not the illegal payments made prior to the Tax Reform Act of 1976 could have an impact on your domestic return?

A. No, I don't believe that is correct, sir.

Q. Why not?

A. As I mentioned earlier, U.S. tax is triggered when a foreign subsidiary pays a dividend, and the debate whether or not such a questionable payment reduced the earnings and profits of a foreign subsidiary would be academic as long as such subsidiary did not pay a dividend.

Q. I should have added, of course, the proposition that they made that distribution on behalf of the parent.

A. Under those circumstances, yes.

Q. Yes. So that debate would have to take place.

Now, if the Commissioner's investigation conducted pursuant to this Summons disclosed any of the factual patterns I have hypothesized here or gave leads to such patterns,

you have agreed with me, have you not, sir, that there could be an impact on your domestic tax return?

A. Yes, I have.

Mr. Fink: I have nothing further.

Mr. Roberts: I have no further questions.

The Magistrate: Thank you.

Mr. Roberts, anything further?

Mr. Roberts: I have nothing further, in response to the Court.

The Magistrate: Are you through, Mr. Fink?

Mr. Fink: May I have a moment with my co-counsel?

The Magistrate: All right.

Mr. Fink: Your Honor, I guess we did mark as Petitioners' 1 that letter, and even though the Summons is attached as an Exhibit to our Petition, may I have that marked Petitioners' 2?

The Magistrate: That is a good idea.

Mr. Fink: All right.

(Petitioners' Exhibit 2 was marked for identification.)

The Magistrate: Is there anything else you want marked at this time, either side?

Mr. Roberts: No, your Honor.

There is one—there is a motion for expedited discovery, which has not been acted on, and interrogatories to the Petitioner, and request to produce.

Mr. Fink: You recall, your Honor, that just prior to this hearing we were served—you may not—I assume you have it in the file—we were served with a—what counsel, with some degree of advocacy, referred to as a "Motion to Ex-

pedite Discovery," what I would have called a "Motion to Shorten Time," in which he sought discovery by way of interrogatories and motions to produce, which, if you will examine them, your Honor, would look quite a bit into our files, as such.

We wrote a brief in opposition pointing out that the better way of authority has suggested that there is no right to discovery in a summons' enforcement matter, unless one first comes home with some showing of absence of ligitimate purpose and that sort of thing.

It seems to me the discovery to an extent has been conducted right here. Only if your Honor feels that they have made any sort of showing about an absence of ligitimate purpose in this Summons, enough to justify discovery, would that now somewhat out-dated motion have any relevance at all.

The Magistrate: Well, the motion has become moot in this sense: You wanted discovery before this hearing. Now of course you have had the hearing now. Why don't I consider those motions in connection with the merits of the case?

Mr. Roberts: Okay. I think that is correct, your Honor.

Mr. Fink: Is there anything further you want from us?

The Magistrate: Now do you want—let me ask you: The summary sheet I was shown at the inception of this hearing, is that the actual 8-K report, or not?

Mr. Fink: No.

Mr. Roberts: No.

The Magistrate: Okay. What is it?

Mr. Fink: I am told it was a schedule provided to the investigators by Upjohn.

Mr. Roberts: This is a schedule, your Honor, provided to the investigator by the Upjohn Company setting forth

the items that, in the Upjohn Company's view, through the years '71 through '76 would have impacted on the Federal Tax Return.

The Magistrate: Is there a similar list for the payments that do not have an impact on the Federal Tax Return, in a more abbreviated form? Did I understand that there was such a list?

Mr. Fink: I heard such testimony myself. I may have even elicited it, but I am not sure, your Honor. There was one furnished to the Revenue Service, yes.

The Magistrate: That is what I am talking about. Is that available?

And my next question is, should either of these be an Exhibit in this proceeding?

Mr. Fink: Well, I think counsel was somewhat reluctant to put this schedule in, and so far as I was concerned, I used it only, your Honor, to make clear with the witness precisely how little or how sketchy what had been turned over was.

The Magistrate: I see. Mr. Roberts, is there some way——

Mr. Fink: If you would like it under seal, I have——

Mr. Roberts: I would have no objection if it is under seal, your Honor.

The Magistrate: That was my next question. All right. Why don't we do that. It might be helpful. I really don't know at this point.

Mr. Roberts: I don't either, your Honor.

Mr. Fink: If you would like us also to produce for under seal the other——

The Magistrate: I think it would be advisable to do that.

Mr. Fink: That you have such. All right. Those will be for your Honor's in camera inspection under seal for any——

The Magistrate: Is there any sense in having the 8-K and amended 8-K?

Mr. Fink: I think that it might be advisable, your Honor. I have only the original 8-K. P-3, I would make that——

The Magistrate: Mr. Roberts, do you have any objection to that?

Mr. Fink: And if we could substitute or add at a subsequent time the amended.

The Magistrate: Let's see if Mr. Roberts has any objection to that.

Mr. Roberts: Beg your pardon?

The Magistrate: Do you have any objection to introducing as an exhibit the 8-K report and the Amended 8-K report?

Mr. Roberts: No, I do not.

The Magistrate: Let's do that.

Mr. Fink: It is hardly legible.

The Magistrate: Why don't you furnish me when you can some legible copies of those two documents.

Mr. Fink: Well, I think this is all we have.

The Magistrate: Oh, I see. All right.

Mr. Fink: Now if they have—I don't have an objection. This is P-3, your Honor, which would—Petitioners' Exhibit 3, which would be the original 8-K for the month of March, '76.

The Magistrate: And where is the Amended?

Mr. Roberts: We will submit a clear copy by mail. Mine happens to be marked up, your Honor, or I would withdraw it and make it a copy now. But we will submit a clean copy that is clear.

Mr. Fink: Of both the original 8-K submission and the Amended one?

Mr. Roberts: And the Amended one.

Mr. Fink: I would appreciate if you could furnish us in Washington with a copy of the Amended one, because we don't have it.

The Magistrate: Mr. Reinardy, when those come in, how should we mark them?

Mr. Roberts: You don't have it? It was furnished.

The Magistrate: Just a minute. Just a minute, gentlemen.

Jim, how should we mark those when they come in?

(Discussion was had off the record.)

(The referred-to Amended Form 8-K will be marked as Petitioner's Exhibit 4 when it comes in.)

The Magistrate: Anything further?

Mr. Roberts: Your Honor, I might point out that the Company feels very strongly these listings should not be made public in any way, and I understand that they will be sealed.

The Magistrate: That's right.

Mr. Roberts: And will be returned to whichever party—this one will be submitted now under seal.
Are you going to draft or copy the——

Mr. Fink: I am going to find out which it is. I am currently informed it is this (referring to a document), is this correct?

Mr. Knack: I suppose, to save the Court's time—and I will work with my counsel from Washington, and I personally will deliver to the Court both of those documents.

The Magistrate: All right. Let's do it that way.

Mr. Roberts: This is it without one very important part to it: The country is not identified. Now I don't know whether we did furnish the Revenue Service a listing of the country, as well, on each of these pages, your Honor. There is a country number one, not each of the pages, but the pages beginning "country one." It goes through to whatever the final number is, with no identification of the country.

The Magistrate: All right. Let's do it this way: Mr. Knack as local counsel will furnish me these two other—there are two reports, aren't there?

Mr. Roberts: Two reports, yes.

The Magistrate: And they will be designated Respondent's Exhibits 4 and 5 when they come in.

(The referred-to documents will be marked for identification as Respondent's Exhibits 4 and 5 when they come in.)

(As Respondent's Exhibits 1, 2, and 3 marked for identification earlier on in the proceedings having been withdrawn by Mr. Roberts, the two referred-to documents, when they come in to the Magistrate, will be marked for identification as Respondent's Exhibits 4 and 5, respectively.)

The Magistrate: And will you furnish a copy, Mr. Knack, to Mr. Fink?

Mr. Knack: Yes, sir.

Mr. Fink: And they will be held under seal by the Court, but, nonetheless——

The Magistrate: That is my understanding. Only those two Exhibits, Exhibit 4—Respondent's Exhibits 4 and 5.

Mr. Fink: That's correct, your Honor.

The Magistrate: Now do you want to help me with some briefs in this matter?

Mr. Roberts: I will be happy to do so.

The Magistrate: Why don't each of you get a copy of the transcript.

Mr. Fink: We thought that we——

The Magistrate: And file a brief and—what, how much time do you want?

Mr. Roberts: Do you want proposed findings with the brief?

The Magistrate: It might be helpful.

Mr. Fink: Your Honor appreciates that both sides have briefed it somewhat as a trial matter, and now the facts have perhaps been a little better developed.

The Magistrate: I think they have.
How much time after you receive the transcript would you want?

Mr. Roberts: What time do you want? You are the Petitioner and the moving party.

Mr. Fink: Well, you understand with us speed in the enforcement of Summons is an important, and procrastination in the preparation of briefs is fink.

Mr. Roberts: "Is fink," did you say?

Mr. Fink: That was my attempted humor.
What do we need, Mr. Nath?

Mr. Nath: Two weeks will be suffice.

Mr. Fink: Two weeks, fine. I have Mr. Nath working and not I.

The Magistrate: After you receive the transcript?

Mr. Fink: After receipt of the transcript. Preferably in Washington after receipt of the transcript.

The Magistrate: That is enough time?

Mr. Nath: Yes, your Honor.

The Magistrate: Fine.

Mr. Roberts: I would say two weeks after we receive their brief to respond.

The Magistrate: All right.

Mr. Fink: And we get to reply, of course, to their affirmative defenses.

The Magistrate: Well, I don't want, you know, briefs coming in by the bushel.

Mr. Nath: Your Honor, I would suggest a simultaneous briefing schedule.

Mr. Fink: We are willing to give a simultaneous briefing schedule.

The Magistrate: Why don't we do this: A simultaneous briefing and a reply brief ten days thereafter, and stop there.

Mr. Fink: Very good. After receipt of the transcript in Washington, good enough. Thank you.

The Magistrate: All right. Thank you, gentlemen. It is nice to have competent lawyers before the Court. Thank you very much.

Mr. Roberts: Thank you, your Honor.

(At 5:30 p.m. on Wednesday, October 12, 1977, the proceedings were concluded.)

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**REPORTER'S CERTIFICATE**

I, James L. Reinardy, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ JAMES L. REINARDY 11-6-77
James L. Reinardy, CSR-RPR
U.S. District Court Reporter
652 Federal Building
Grand Rapids, MI 49503

[Filed as Exhibit to Transcript of Proceedings:
November 8, 1977]

March 26, 1976

Mr. Roy Little
Internal Revenue Service
1800 Cadillac Tower
Detroit, Michigan 48226

Dear Roy:

As we indicated to you last Friday, the company plans to file a Form 8-K covering "improper payments" with the S.E.C. sometime this week. We have now determined the date for the filing as Friday, March 26, 1976. A copy of the Form 8-K is enclosed.

You'll notice, based on the preliminary results of the investigation, payments have been identified in twenty two countries. Since January 1, 1971 the total amount of these payments has been $2,710,000 (an amount somewhat larger than we indicated to you) and relates to sales which are estimated to be $27,069,000.

Roy, for now and until the final results of the investigation and survey are fully known, we would prefer to limit our reporting to the figures contained in the Form 8-K, although we realize fully we will ultimately have to provide you with amounts country by country. We do know that a couple of branches of our Western Hemisphere Corporations were involved in such payments and we recognize that these payments create tax problems.

We will continue to keep you posted concerning the results of our investigation. Likewise, as you formulate your plans, please let us know what will be required of us.

Sincerely,

C. H. Ludlow

gw
Enclosure

cc A.R. Lincoln
G. Thomas
J.P. Casey

[Filed as Exhibit to Transcript of Proceedings, November 8, 1977]

"EXHIBIT 1"

**SUMMONS**

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

In the matter of the tax liability of
THE UPJOHN COMPANY
7000 Portage Road
Kalamazoo, Michigan 49001
Internal Revenue District of Detroit
Period(s) 1972, 1973, 1974

The Commissioner of Internal Revenue

To Gerard Thomas, Vice President and Secretary
The Upjohn Company

At 7000 Portage Road, Kalamazoo, Michigan 49001

Greetings: You are hereby summoned and required to appear before James M. Rogowski, an officer of the Internal Revenue Service to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

The following records of the Upjohn Company:

All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly

accounted for on the corporate books during the same period.

The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.

Place and time for appearance:

at Rm. B-41, Federal Building, 410 W. Michigan Avenue, Kalamazoo, MI 49005 on the 7th day of December, 1976 at 11:30 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 23rd day of November, 1976.

Attested Copy

JAMES ROGOWSKI, Special Agent
Signature, Title

Form 2039 (Rev. 2-74)

Internal Revenue Service

Authorized By: JASON R. GUDDE, Group Manager
Signature, Title
Prior Authorization Received From:
Name, Title
On

Date

Signature Issuing Officer

**CERTIFICATE OF SERVICE OF SUMMONS**

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date—November 23, 1976. Time—11:45 a.m.
How Summons Was Served:

☒ I handed an attested copy of the summons to the person to whom it was directed.
GERARD THOMAS

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed.

RICHARD C. VERVISCH, Special Agent
Signature, Title

Sec. 7603—Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

[Filed as Exhibit to Transcript of Proceedings:
November 8, 1977]

1-4147-2 Orig.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 8-K

SECURITIES AND EXCHANGE COMMISSION
Received March 26, 1976
OFFICE OF REGISTRATIONS & REPORTS

**CURRENT REPORT**

Pursuant to Section 13 of the
Securities Exchange Act of 1934

For the Month of March, 1976

THE UPJOHN COMPANY
(Exact name of registrant
as specified in charter)

7000 Portage Road, Kalamazoo, Michigan 49001
(Address of principal executive offices)

INFORMATION TO BE INCLUDED IN REPORT

**Item 13. Other Materially Important Events.**

In January, 1976, the management of the Company learned that in two foreign countries payments were being made to government employees, or to third parties believed to be acting as intermediaries for government employees, for the purpose of securing government business. Management immediately ordered the cessation of these payments and initiated an investigation commencing with the period beginning January 1, 1971, to determine whether other payments had been made and whether any Company funds or assets had been improperly accounted for on the Com-

pany books. This investigation is being conducted under the supervision of the Company's General Counsel with the assistance of outside legal counsel.

The investigation so far has involved interviews in the United States and abroad with 45 officers and employees of the Company and its subsidiaries and examination of certain relevant files and records of the Company available in the United States. A written questionnaire was also sent to the managers of the Company's 53 foreign subsidiaries.

The Company's worldwide sales in 1975 were $890,771,000. Total worldwide sales for the years 1971 through 1975 were $3,282,553,000. Since January 1, 1971, there have been payments totaling $2,710,000 which were related to sales estimated to be $27,069,000, or less than 1% of the Company's total sales during this period. All of these payments were made for the purpose of securing sales to government agencies or instrumentalities. Because of common and long-established business practices in certain countries, the managers of some subsidiaries felt that payments of this type were necessary to compete successfully for government business. In addition, payments since 1971 totaling $26,200 were made in connection with other foreign governmental actions related to the Company's foreign business. Although most of these payments were made to persons who may be serving as intermediaries for employees of foreign governments, some of them were made directly. There were payments in 22 of the 136 countries which the Company serves. Small payments were also made to minor government employees to expedite governmental services to which the foreign subsidiaries were entitled.

No corporate political contributions of any kind in the United States or in any foreign country have been discovered.

None of the outside Directors had any knowledge that the Company was engaged in any questionable transac-

tions or practices until the meeting of the Board of Directors on February 17, 1976.

No Director approved any direct payments to a government employee. However, certain inside Directors and officers associated with international operations, approved or had knowledge of payments to third parties who it now appears may have made payments to foreign government employees.

The Company's Board of Directors was informed at its meeting on February 17, 1976 of the problem in two foreign countries and at its meeting on March 16, 1976, it was given additional information. At the February meeting the Board was advised that the General Counsel of the Company, with the assistance of outside counsel, had been instructed to conduct a thorough investigation of the matter. At the March meeting, the Board reviewed and approved the steps taken in the investigation and the "Statement of Policy", set forth as Exhibit A hereto.

The Company has notified the Internal Revenue Service of its investigation and has taken steps to assure that no improper United States tax deduction will result for the year 1975. The Company will confer with the Internal Revenue Service with respect to prior federal income tax returns.

This investigation is still in progress and this statement is based on the information gathered up to this time. At the conclusion of the investigation, the results will be reported to the Board and an appropriate report will be filed with the Securities and Exchange Commission.

The management of the Company is of the opinion that the payments described above have not been, individually or in the aggregate, material to the Company's business or financial position considered as a whole. Although the termination of these payments may limit the ability of the Company to compete in some foreign countries, manage-

ment is of the opinion that any adverse effect will not be material to the overall financial position and business of the Company.

On March 10, 1976, the Company disseminated to Upjohn employees worldwide the "Statement of Policy" (Exhibit A hereto) stating the Company's policy of strict compliance with all laws and regulations and specifically prohibiting illegal or improper payments from corporate funds or assets.

In accordance with the practice of other corporations reporting matters of this type, the Company is voluntarily making this current report under the heading "Other Material Events" on Form 8-K. As indicated above, the Company does not view these matters to be material, and their disclosure herein is not an admission of materiality.

**Item 14. Financial Statements and Exhibits.**

(a) Financial Statements:
None

(b) Exhibits:

Exhibit A—General List Notice dated March 10, 1976 entitled "Policy on Political Contributions, Payments to Government Personnel and Proper Accounting Practices"

**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

THE UPJOHN COMPANY REGISTRANT

/s/ By GERARD THOMAS
Gerard Thomas, Vice President
and Secretary

Dated: March 26, 1976

EXHIBIT A

**GENERAL LIST NOTICE**

Subject: Policy on Political Contributions, Payments to Government Personnel and Proper Accounting Practices

Date: March 10, 1976 E-6

**POLICY**

Upjohn will comply with all laws and regulations. In addition, Upjohn will conduct its affairs in accordance with those high ethical standards historically maintained by the company.

Upjohn will make no payments for non-government use to employees or officials of any government. Upjohn will make no political contribution to individuals or political parties, even where such contributions may be legal.

**EXPLANATION**

**1. Coverage**

This policy applies to The Upjohn Company and any subsidiary or affiliate which it controls. It applies to Upjohn's dealings with governmental units and governmental officers or employees at all levels.

**2. Third Party Payments**

Sales commissions or other payments to third parties will not be used as a subterfuge for bribes or illegal payments. All payments to distributors, agents or other third parties must be proper and legal.

**3. Gratuities, Tips and Gifts**

Upjohn policy does not prohibit customary gratuities, tips and gifts. However, these shall not exceed $100 per year to any individual and his family.

**PROCEDURE**

**1. Record Keeping**

Accurate financial records must be maintained and recorded in our books in accordance with accepted accounting principles. Payments should be acknowledged by receipts from individuals with apparent authority to receive payments. No fund for any purpose shall be established which is not accurately recorded on the regular company books.

**2. Compliance**

Any future agreements with foreign distributors, agents or other third parties and any significant modifications in existing agreements, including any payments or discounts not required by the agreements, must be approved by a company attorney in Kalamazoo.

All managers are responsible for insuring the enforcement of and compliance with this policy, including that distribution necessary to insure employee knowledge and compliance.

Any violations of this policy are to be reported immediately to the company's Treasurer or General Counsel in Kalamazoo.

Managers may be required periodically to certify in writing that they have no knowledge of any violations of this policy which have not been reported to the company's Treasurer or General Counsel.

Any questions regarding the implementation of this policy should be referred to the company's General Counsel.

Henceforth, intentional violation of this policy will constitute grounds for dismissal.

R. T. Parfet, Jr.

No Bulletin Posted
Distribution: Kalamazoo
All DC/SA Supervision
ds1 Homemakers' Managers

[Filed as Exhibit to Transcript of Proceedings:
November 8, 1977]

4147-2 Orig.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

**Form 8**

**AMENDMENT TO APPLICATION OR REPORT**

Filed pursuant to Section 12, 13 or 15(d) of
THE SECURITIES EXCHANGE ACT of 1934

THE UPJOHN COMPANY
(Exact name of registrant as specified in charter.)

**Amendment No. 1**

SECURITIES AND EXCHANGE COMMISSION

Received July 29, 1975

OFFICE OF REGISTRATION & REPORTS

The undersigned registrant hereby amends the following items, financial statements or exhibits or other portions of its CURRENT REPORT FOR MARCH, 1976 on Form 8-K as set forth in the four pages attached hereto:

**Item 13. *Other Materially Important Events.***

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this amendment to be signed on its behalf by the undersigned, thereunto duly authorized.

THE UPJOHN COMPANY

/s/ By GERARD THOMAS
Gerard Thomas, Vice President,
Secretary and General Counsel

Dated: July 28, 1976

**Item 13. Other Materially Important Events.**

In its Current Report on Form 8-K for the month of March, filed March 26, 1976, the Company disclosed that it was conducting an investigation to identify payments to employees of foreign governments and any political contributions made by the Company or any of its affiliates since January 1, 1971 and to determine whether any Company funds or assets had been improperly accounted for on the Company books during the same period. This investigation has been conducted under the supervision of the Company's General Counsel with the assistance of outside legal counsel. This Current Report describes the results of the investigation.

At the time the Company filed its Current Report for March a written questionnaire had been sent to the managers of the Company's 53 foreign affiliates, interviews had been conducted in the United States and abroad with 44 officers and employees of the Company and its subsidiaries, and certain relevant files and records of the Company had been examined. Since that time all of the Company's foreign affiliates have responded to the questionnaire, either orally or in writing, 42 additional interviews have been conducted, and a further review of Company files and records has been made.

In the initial report filed with the Securities and Exchange Commission on March 27, 1976, the Company stated that, although the investigation was still in progress, the information at that time indicated that since January 1, 1971, payments totaling $2,710,000 had been made to employees of foreign governments, or to persons who appear to have been serving as intermediaries for such employees, for the purpose of obtaining sales to government agencies or instrumentalities. Further investigation has disclosed additional payments of this type of $914,000. In addition questionable payments of $474,000 were made to numerous non-governmental hospital employees during the five-year

period in one foreign country. Thus the total payments related to sales are $4,098,000. Some of these payments were not related to specific sales and the amount of some other sales can only be estimated. The aggregate of the actual and estimated sales to which payments can be related, however, is approximately $46,769,000. In addition, since 1971 payments totaling $147,579 have been made in connection with other foreign governmental actions related to the Company's foreign business. The Company has not determined the legality of the payments described in this paragraph under the applicable foreign laws. Small amounts which were paid to minor government employees to expedite governmental services to which the foreign subsidiaries were entitled are not included in the above totals.

It has also been discovered that political contributions totaling $370 were made in two foreign countries where such contributions are legal.

Twenty-nine of the approximately 150 countries which the Company serves were involved in the payments described above. The amount of sales related to these payments is approximately one and a half percent of the Company's total worldwide sales for the years 1971 through 1975 of $3,282,553,000.

None of the Company's outside directors had any knowledge that the Company was engaged in any questionable transactions or practices until the meeting of the Board of Directors on February 17, 1976.

Certain officers and inside directors associated with international operations approved or had knowledge of payments under circumstances indicating that the payments either were, or might have been, for foreign government employees.

Some of the payments referred to above were included in the Company's consolidated United States tax return and were deducted by the Company for federal income tax

purposes. The Company will file amended federal income tax returns for the years in which such payments were deducted and will pay such additional taxes as result from such amendments. The Company has been advised by the Internal Revenue Service that it is conducting an investigation for possible criminal violations or civil penalties arising under provisions of the Internal Revenue Code. It is not expected that this investigation will result in additional tax or penalties which would be material to the Company.

No fund or asset of the Company has been discovered in the course of this investigation which does not appear on the Company books. The payments described above were recorded on the books of the subsidiaries and branches involved under various accounts, which, in some instances, did not provide an adequate description of the purpose of the payment.

Since February at its regular monthly meetings, the Company's Board of Directors has been advised of the progress of the Investigation.

As stated in the Company's Current Report for March, the management of the Company is of the opinion that the payments described above have not been individually, or in the aggregate, material to the Company's business or financial position considered as a whole. Although the termination of these payments may limit the ability of the Company to compete in some foreign countries, management is of the opinion that any adverse effect will not be material to the overall financial position and business of the Company.

The Company is voluntarily making this amendment to its Current Report on Form 8-K filed on March 26, 1976, under the heading "Other Materially Important Events." As indicated above, the Company does not view these matters to be material, and their disclosure herein is not an admission of materiality.

[Filed: February 23, 1978]

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. K77-7 Misc. CA 4

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioners*

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
*Respondents*

**REPORT AND RECOMMENDATION OF MAGISTRATE**

This is a proceeding to enforce an Internal Revenue Service summons issued on November 23, 1976 by a special agent of the Internal Revenue Service to the Upjohn Company (herein called the Company) and Gerard Thomas, its Vice President and Secretary.

The summons was issued pursuant to section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602, which provides:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Following the respondents' refusal to comply with the terms of the summons, a petition to enforce the summons was filed in this court pursuant to sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 7402(b) and 7604(a).[1]

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[1] Section 7402(b) provides:

"(b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Section 7604(a) provides:

"(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district

On August 31, 1977, an order to show cause was entered directing the Company and Gerard Thomas to show cause why they should not be compelled to obey the summons. A hearing was scheduled for September 26, 1977, which was adjourned to October 12, 1977 by agreement of counsel. A hearing was held before the undersigned on the adjourned date.

The summons directed the Company and Mr. Thomas to appear before James M. Rogowski, an officer of the Internal Revenue Service, to give testimony relating to the tax liability of the Company for the years 1972, 1973, and 1974, and also to produce for examination the following records of the Company:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.
>
> "The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries."

The Company and Mr. Thomas refused to produce the records referred to in the summons on the ground that the records were shielded from disclosure by the attorney-

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court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

client privilege or the work product doctrine, and that the standards required for judicial enforcement of the summons had not been met.

**Findings of Fact**

The Company is a multinational corporation engaged in the manufacture and marketing of pharmaceuticals. It does business in approximately 150 foreign countries both through foreign subsidiaries and foreign branches of United States subsidiaries. Its worldwide sales in 1975 were over 890 million dollars (Petitioner Exhibit 3, Tr. 63). The Company files a consolidated federal income tax return with some of its subsidiaries, but some of its foreign subsidiaries or affiliates are not included in that return. (Tr. 11)

Mr. Thomas is a Vice President, Secretary, and General Counsel of the Company. He is also a member of its Board of Directors and serves as an officer of some of the subsidiaries. (Tr. 62, 77)

In January 1976, the Company's outside auditors, in the course of auditing one of the Company's foreign subsidiaries (Upjohn International Inc.), discovered that payments were being made by the foreign subsidiary to government employees, or to third parties believed to be acting as intermediaries for government employees, for the purpose of securing government business. (Petitioner Exhibit 3, Tr. 78-79). The petitioner has referred to these payments as bribes or kickbacks paid directly or indirectly to foreign government employees to influence their action. Mr. Thomas in his testimony described them as "payments made by or on behalf of the Company or its subsidiaries, which were made to third parties or to Government employees under circumstances indicating that they might be for improper purposes." (Tr. 59-60). They will be referred to hereafter as the "questionable payments." From 1971 through 1975 these payments were in excess of four million

dollars. (Petitioner Exhibit 4). The fact of such payments was apparently known by certain inside directors and officers associated with the international operations of the Company. (Petitioner Exhibit 3).

The discovery of the questionable payments was reported by the auditors to Mr. Thomas and other individuals in the Company in January 1976. (Tr. 79) Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the Company with respect to the payments. (Tr. 60-61, 79). As a part of the investigation, Mr. Thomas and outside counsel prepared a written questionnaire to be mailed by the Chairman of the Board to 53 foreign general and area managers of the Company. The questionnaire elicited information regarding questionable payments and directed the addressee to return the form to Mr. Thomas. (Tr. 66, Respondents' Exhibits 2 and 3.)

In addition, Mr. Thomas interviewed by telephone or in person all persons to whom a questionnaire had been sent. He and two outside counsel also interviewed other persons who had not been mailed questionnaires. A total of 86 persons were interviewed, some of whom were no longer employees of the Company. (Tr. 64-66, 95-97, Respondents' Exhibit 1). The interviewer made written notes of the interviews. Mr. Thomas described his notes of the interviews as follows:

> "My notes would contain what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere. They were more than just a ver-

batim report of my conversation with the—a report of my conversation in the interviews." (Tr. 65)

The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel. (Tr. 65-66, 69-70)

Following Mr. Thomas' initial investigation of the questionable payments, the Company, on March 26, 1976, made a preliminary report of such payments to the Securities and Exchange Commission (SEC) on its Form 8-K. This report disclosed, based on Mr. Thomas' questionnaires and interviews, that the Company since January 1, 1971 had made questionable payments totalling $2,710,000 in 22 of the 136 countries served by the Company. The report to the SEC stated that the Company's investigation was still in progress and that further investigation would be furnished when the investigation was concluded. At the time the report was filed Mr. Thomas was aware that other companies were making similar disclosures and that the SEC had indicated a policy of more lenient treatment of corporations which voluntarily disclosed the type of payments here involved. (Petitioner Exhibit 3, Tr. 81-84). At the time of the disclosure to the SEC, the Company agreed to furnish the SEC with any additional data it might request with respect to the questionable payments. (Tr. 103-104)

On July 26, 1976, the Company filed with the SEC an amendment to its Form 8-K, in which it reported that responses, oral or written, had been received to all questionnaires, that additional interviews had been conducted, and that the total of questionable payments was in excess of four million dollars. (Petitioner Exhibit 4, Tr. 84)

Contemporaneously with the filing of the SEC Form 8-K in March 1976 and the amendment of Form 8-K in July 1976, the Company sent copies of those forms to the Internal Revenue Service. (Tr. 69, 84).

Prior to the filing of the 8-K report with the SEC in March 1976, the IRS had been conducting an audit of the Company's 1972 and 1973 consolidated federal income tax returns. That audit had almost been concluded when the IRS received a copy of the SEC 8-K report (Petitioner Exhibit 1). As a result the audit was not closed. The matter was referred to the Revenue Service's Intelligence Division, which, in a joint investigation with Revenue Agents, undertook an investigation for the years 1972, 1973, and 1974. (Tr. 29, 36-38)

The Company has furnished two schedules to IRS regarding the questionable payments. One schedule is entitled "Summary of Company Payments By Year (Companies Listed Are Those Companies with U. S. Tax Implications Only)." The schedule purports to list the date, the amount the company making the payment, and the country in which the payment was made from 1971 to early 1976. The Company listed on this schedule only those payments which it believed had an effect on its consolidated federal income tax returns. The payments shown total approximately $700,000. (Tr. 29-33)

The second schedule is less detailed and purports to be a county-by-country summary of payments made in connection with the Company's foreign operations which the Company claims do not affect its consolidated federal income tax returns. These payments total approximately $3,700,000. (Tr. 33-34).[2] The Company also furnished IRS with source documentation underlying the schedules, such as cancelled checks, vouchers, invoices, advices, etc., but the IRS claims it has not been furnished with sufficient data to enable it to determine whether there are more

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[2] The schedules were not introduced as exhibits but copies were furnished to me for my *in camera* inspection. It is not clear from the record whether these are the same schedules which the Company furnished to IRS, but for present purposes I am assuming that they are the same.

questionable payments than those shown in the schedules and whether the persons shown as ultimate recipients are in fact such. (Tr. 19-21, 33-35)

The Company has no objection to interviews and has permitted interviews by the IRS of Company employees involved in making questionable payments, but will not permit questions as to transactions which the Company has determined do not affect its consolidated federal income tax returns. (Tr. 46-48, 66-67). The Company has not agreed to bring any of its employees in foreign countries to the United States for interviews. (Tr. 104-105)

**The Attorney—Client Privilege**

The respondents claim that disclosure of the summoned material is shielded from disclosure by the attorney-client privilege. An oft-quoted definition is the one set forth in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950):

> "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.* at 358.

Professor Wigmore defines it as follows:

> "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as

such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived." 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961).

There is no question that the attorney-client privilege extends to corporations, *Radiant Burners, Inc. v. American Gas Association,* 320 F.2d 314 (7th Cir. 1963), and thus may be invoked by the Company here. Nor is there any question that "house counsel," such as Mr. Thomas when acting as a legal advisor to the Company, is within the purview of the attorney-client privilege under the same circumstances as "outside counsel." *Natta v. Hogan,* 392 F. 2d 686 (10th Cir. 1968).

As with all privileges, the person claiming the privilege has the burden of establishing all its essential elements. *In re Horowitz,* 482 F.2d 72 (2nd Cir. 1973), cert. den. 414 U.S. 867 (1973). The Sixth Circuit has observed that the privilege is designed to enable a client to confide in his attorney, secure in the assurance that there will be no disclosure, but that the privilege does not envelope everything arising from the existence of an attorney-client relationship. *United States v. Goldfarb,* 328 F.2d 280, 282 (6th Cir. 1964):

> "It is to be remembered that the attorney-client privilege is an exception carved from the rule requiring full disclosure, and as an exception should not be extended to accomplish more than its purpose. As Dean Wigmore said in his oft-quoted statement: 'It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.' 8 Wigmore, Evidence § 2291, at 554 (Mc-

> Naughton rev. 1961). The judicial decisions have echoed this need for a restrictive interpretation and application of the privilege. Prichard v. United States, 181 F.2d 326 (C.A. 6); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass.) *Id.* at 282.

The privilege is at best a difficult one to apply. It becomes even more difficult when, as here, the client is a corporation. This stems from the fact that a corporation, being an artificial legal entity, can only act through its agents or employees. Since the attorney-client privilege applies only to communications by or to a "client," and since a corporation can communicate only through its employees or agents, the question arises as to the circumstances under which a communication of an employee or agent of the corporation may be deemed to be the communication of the corporate client enabling the corporation to claim the attorney-client privilege.

The landmark case of *Hickman v. Taylor,* 329 U.S. 495 (1947) dealt inferentially with this problem in the context of a partnership. The Court concluded that no attorney-client privilege could be claimed in that case by the defendant partnership for statements taken by the defendant's attorney from the crew members of the defendant's vessel, which was involved in an accident. The Court treated the employee crew members simply as witnesses and outside the scope of the privilege.

The problem was probably first met squarely and discussed in depth in *Philadelphia v. Westinghouse Electric Corp.,* 210 F. Supp. 483 (E.D. Pa. 1962), which involved the defendant's claim of privilege with respect to information acquired by its general counsel from an employee in the course of the counsel's investigation of facts relating to a pending indictment of the defendant. The court adopted the so-called "control group" test for determining whether the communication of a corporate employee or agent could

qualify as being the communication of the corporate client for the purpose of a corporation's invoking the attorney-client privilege. The court stated:

> "Now, in cases where an employee of a corporation in an executive or managerial position communicates a fact relative to pending litigation to a lawyer retained or employed by the corporation, the question frequently arises: When he does so, is the corporation seeking the advice of the attorney? In other words, was he at the time, in contemplation of law, the corporation seeking advice? If not, then he was giving the lawyer information in order that the latter could advise a client other than himself. In such case the employee is merely a witness and I think that Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, settles the question that a statement given by a witness to a lawyer who is collecting information in order to prepare for litigation pending against the lawyer's client is not privileged although it may be within the ambit of the 'work product' principle; and it is very important to keep in mind the fact that the work product principle is not and cannot properly be described as a privilege. Some Courts have confused the situation by calling it a qualified privilege, but it is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case." *Id.* at 485.

The court also stated that the rank in the corporation of the employee making the communication is not a satisfactory guide in determining whether the privilege is applicable because such terms as manager, executive, or officer are not clearly defined terms. *Id.* at 485. The court stated the proper approach as follows:

> "Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the

asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice." *Id.* at 485

The court went on to conclude that the communications made by the employee were not within the attorney-client privilege, stating:

"It is obvious that the matter as to which the witnesses in this case made the disclosures was a matter of overwhelming importance to the corporation, and that even a department or division head or an employee on a similar managerial level would hardly be given any substantial role in making that decision. It was a matter which, of course, the corporation knew made it probable that very heavy claims for damages would be asserted against it and a decision of that kind could have been made only by the very highest authority." *Id.* at 485-6.

In essence the court held that if the employee making the communication, of whatever rank he might be, was in a position to control or even to take a substantial part in a decision about any action which the corporation might take upon the resulting advice of the attorney, or if he was an authorized member of a body or group which had that authority, then in effect he was or personified the corpora-

tion when making the disclosure, and the privilege would apply, while in all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

The control group test has been followed in many decisions. See, for example, *Natta v. Hogan,* 392 F.2d 686 (10th Cir. 1968); *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.,* 68 F.R.D. 397 (E.D. Va. 1975); *United States v. International Business Machines Corp.,* 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Burlington Industries v. Exxon Corporation,* 65 F.R.D. 26 (D. Md. 1974); *Honeywell Inc.* v. *Piper Aircraft Corp.,* 50 F.R.D. 117 (M.D. Pa. 1970); *Congoleum Industries Inc. v. G.A.F. Corp.,* 49 F.R.D. 82 (E.D. Pa. 1969); *Garrison v General Motors Corp.,* 213 F. Supp. 515 (S.D. Cal. 1963).

I am aware of *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970), affirmed *per curiam* by an equally divided court, 400 U.S. 348 (1971), reh. den., 401 U.S. 950 (1971), cited in respondents' brief, which held that the control group test is not wholly adequate. The court held that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. It would appear that the *Harper & Row* formula would exclude virtually nothing from its sweep and flies in the face of the well-established principle that the privilege "should be strictly confined with the narrowest possible limits consistent with the logic of its principle." *United States v. Goldfarb,* supra.

It would also appear to open the door to the danger envisioned by the Supreme Court in *Hickman v. Taylor*, supra:

> "Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents." 329 U.S. at 506.

In view of the overwhelming acceptance of the control group test, I have concluded that it should be followed in this case.[3] Thus the fact that the persons interviewed by Mr. Thomas were branch managers or area managers is not determinative of whether the privilege is applicable. The important question is whether they were in a position to control or to take a substantial part in a decision about any action the Company might take upon the advice of Mr. Thomas, or whether they were merely giving information to Mr. Thomas to enable him to advise those in the corporation having the authority to act or refrain from acting on his advice. It is apparent from the record that the matter as to which the interviewees made the disclosures to Mr. Thomas was a matter of overwhelming importance to the Company but not one as to which any of the interviewees would be given any substantial role. When Mr. Thomas first heard of the questionable payments, he went first to

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[3] It is speculative as to how much, if any, of the information Mr. Thomas obtained from the Company employees would be protected even under the *Harper & Row* formula, since it requires that the employees' communications deal with subject matter within the duties of their employment. Mr. Thomas testified that the person interviewed may himself have been a participant in the payments or he may have been reporting on what he had learned, through investigation, about the activities of others. (Tr. 93-94)

the Chairman of the Board to discuss the matter. The questionnaire that was sent to the employees went out over the signature of the Chairman of the Board. Mr. Thomas' concern was with the SEC ramifications, the tax consequences, currency regulations, and the like. (Tr. 79-80). These are matters on the highest corporate level and hardly within the domain or authority of the persons interviewed. Clearly, these persons in completing the questionnaires and submitting to interviews were simply giving information to Mr. Thomas to enable him to advise the Board of Directors and its Chairman as to how to handle the securities, tax, and related problems which the questionable payments created. Only the latter had the authority to act in these areas. Thus the disclosures made by the interviewees to Mr. Thomas or the Company's outside counsel do not fall within the attorney-client privilege.

It may also be noted that the attorney-client privilege may be lost or waived by disclosing to others what has earlier been confided to an attorney. See *United States v. Cote,* 456 F. 2d 142 (8th Cir. 1972) (filing of amended tax returns which reflected accountant's workpapers to which privilege had attached effectively waived the privilege not only as to the transmitted data but also as to the details underlying that information); *United States v. Schoeberlein,* 335 F. Supp. 1048 (D. Md. 1971). (Work papers of accountant-attorney were no longer privileged after being used as a basis for a Federal Communication Commission license application as well as for a tax return); *B & C Trucking Co. v. Holmes & Narver, Inc.,* 39 F.R.D. 317 (D. Haw. 1966). (Disclosure of internal communications between contractor and its attorney to Atomic Energy Commission destroyed or waived any attorney-client privilege.) The doctrine of waiver was referred to in *Duplan Corporation v. Deering Milliken, Inc.,* 397 F. Supp. 1146 (D. S.C. 1975) as follows:

"A waiver of the privilege as to all communications ordinarily follows from the voluntary waiver even if made *with limitations* of one or more similar communications. Thus, if a client, through his attorney, voluntarily waives certain communications, but guarded with a specific written or oral assertion at the time of the waiver that it is not its intention to waive the privilege as to the remainder of all similar communications, the privilege, as to the remaining undisclosed communications, is nevertheless waived.

"Plaintiff's argument that waiver requires an intentional relinquishment or abandonment of a known right has a familiar ring with regard to general contract law, but waiver, as applied to the particular subject of attorney-client privilege, may be made by implication:

> "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that *his privilege shall cease whether he intended that result or not.* 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961." *Id.* at 1162 (Emphasis in original)

In the present case, the Company made disclosures to the SEC with respect to the questionable payments in its 8-K report of March 26, 1976, and its amended 8-K report of July 26, 1976. Furthermore, the Company agreed to furnish the SEC with any additional data it might request with respect to such payments. (Tr. 103-104) Copies of the SEC reports and related data was also furnished to the IRS. Having disclosed some data with respect to questionable payments, it now seeks to hold back other data relating to the same matter. Under the circumstances, the

Company should be deemed to have waived the attorney-client privilege with respect to the same matter, if indeed it ever existed. As stated by the court in *Burlington Industries v. Exxon Corporation*, supra:

> "Nevertheless, the court is not unmindful of the fact that privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case. 8 Wigmore, Evidence § 2327 (McNaughton Rev. 1961). Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." 65 F.R.D. at 46,

Mindful of the admonition requiring "a restrictive interpretation and application of the privilege," *United States v. Goldfarb*, supra, I find that the respondents have not sustained their burden of proving that the summoned material is shielded from disclosure by the attorney-client privilege, and that the privilege is not applicable here.

**The Work Product Doctrine**

The respondents claim that disclosure of the summoned material is also shielded from disclosure by the work product doctrine. This doctrine had its genesis in *Hickman v. Taylor*, 329 U.S. 495 (1947). The Court there held that while private memoranda, written statements of witnesses, and mental impressions or personal recollections prepared or formed by an attorney in the course of his legal duties for his own use in prosecuting his client's case and contained in his files or mind fall outside the scope of the attorney-client privilege, and hence are neither protected from discovery on that basis nor protected from disclosure because the subject matter is "privileged" or "irrelevant" as those concepts are used in the federal rules, nevertheless they are protected from discovery as the "work product"

of the attorney, in the absence of any showing of necessity or any indication or claim that denial of discovery would unduly prejudice the preparation of the inquiring party's case or cause him any hardship or injustice.

The respondents argue that counsel's notes of the interviews constitute material squarely covered by the attorney work product doctrine, and that so do the responses to the questionnaires because the information thus obtained is the product of the work of the Company's counsel.[4]

There is, at the outset, a serious question as to whether the work product doctrine is even applicable in a summons enforcement proceeding. In *United States v. McKay*, 372 F.2d 174 (5th Cir. 1967), which also involved the enforcement of an Internal Revenue Service summons under 26 USC § 7604(a), the court held that the relevancy of the work product rule to such a proceeding "may well be doubted." The court stated:

> "We think the power of the Commissioner of Internal Revenue to investigate the records and affairs of taxpayers is greater than that of a party in civil litigation. His power has been characterized by this court as an inquisitorial power, analogous to that of the grand jury and one which should be liberally construed. Falsone v. United States, 5 Cir. 1953, 205 F.2d 734, 742 cert. den. 346 U.S. 864, 74 S. Ct. 103, 98 L. Ed. 375. In such context, the criteria of relevancy and materiality have broader connotations than in the context of trial evidence. Schwimmer v. United States, 8 Cir.

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[4] To the extent that the responses to the questionnaires simply reflect the answers of the employee, they would appear to be no different than the written statement of a witness which records the mental impressions and observations of the witness, rather than those of the attorney. In such case, the response would not properly be considered the work product of the attorney. See *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 (N.D. Ohio 1953).

1956, 232 F.2d 855, 862, cert. den. 352 U.S. 833, 77 S. Ct. 48, 1 L. Ed. 2d 52. As was said in Bolich v. Rubel, 2 Cir. 1933, 67 F. 2d 894, 895, these inquisitorial powers are justified 'because all the facts are in the taxpayer's hands.' Accordingly, the relevancy of the work product privilege enunciated in the *Hickman* case to a proceeding for the enforcement of the Commissioner's summons may well be doubted." *Id.* at 176.

However, even if the work product doctrine is deemed applicable to this type of proceeding, the doctrine is not a privilege, and discovery may still be had upon a showing of "substantial need" and an inability "without undue hardship" to obtain the information by other means. Rule 26(b)(3), Federal Rules of Civil Procedure. *Hickman v. Taylor,* supra, 329 U.S. at 511; *Burlington Industries v. Exxon Corporation,* supra, 65 F.R.D. at 43. Thus in *United States v. Brown,* 478 F.2d 1038 (7th Cir. 1973), the court, although holding that the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue Service summons, nevertheless concluded that a three-page memorandum prepared by an attorney summarizing notes and legal judgments made by the attorney at a meeting involving a discussion of the tax consequences of a client's potential business transaction was not protected from discovery by the attorney's work product doctrine.

The court stated:

"The Supreme Court has also noted the strong Congressional evidence of intent that the Commissioner of Internal Revenue not be impeded in his investigation of taxpayers:

'Section 7601 of the 1954 Code, 26 U.S.C. § 7601, directs the Secretary or his delegate "to the extent he deems it practicable" to cause Treasury Department officers or employees "to proceed . . . .

> and inquire after and concerning" all persons "who may be liable to pay any internal revenue tax." The section thus flatly imposes upon the Secretary the duty to canvass and to inquire.' Donaldson v. United States, 400 U.S. 517, 523, 91 S.Ct. 534, 539, 27 L.Ed.2d 580 (1971).
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> "We think the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons. *The strong public interest as expressed by Congress in enforcement of the Internal Revenue Act may, however, be relevant in considering the degree of necessity which need be shown prior to the enforcement of an order to produce.*" Id. at 1040-41 (Emphasis supplied.)

In the present case, respondents claim that no necessity exists for allowing disclosure of the responses to the questionnaires or to counsel's notes of the interviews because the respondents have already disclosed ample information both to the IRS and SEC, and because the IRS has already interviewed many of the Company employees. However, the fact is that the Company has refused to allow any of its employees to be interviewed as to any transactions which it has determined for itself have no impact on the Company's federal tax return. Nor has it been willing to disclose details of any transactions for which it has reached the same conclusion. (Tr. 46-48, 66-67). Thus, the Company has relegated to itself the determination of what is or is not relevant to the investigation of the Revenue Service. The record demonstrates that the Company has made questionable payments in excess of four million dollars. It concedes that approximately $700,000 of those payments affect its consolidated federal tax return. As to the balance of payments, the Company insists that the Revenue Service must accept the Company's conclusion that those payments have no effect on its tax return. (Tr. 33-35) Special Agent Novak testified that instead of accepting the summary of

the Company's investigation at face value, he wished to obtain additional information, such as verification of the recipients of the payments, and to check whether there may have been payments which were not recorded on the Company's books. (Tr. 14, 51-52) Moreover, it is not inconceivable that a payment which the Company claims has no impact on its domestic tax return may upon investigation disclose the contrary.

The necessity for compelling disclosure in this case is also indicated by the fact that the persons interviewed are beyond the jurisdiction of the court and thus not subject to compulsory process. Even if they were made available for interviews,[5] it is not unreasonable to expect some hesitancy, if not actual hostility, in answering questions with respect to payments which might have been made in violation of local laws. Moreover, where interviews have in fact been permitted, the scope of the inquiry has been limited to what the Company's counsel deemed appropriate. (Tr. 46-48) In *Hickman* v. *Taylor,* supra, the Court stated that "production [of work product] might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U.S. at 511. Similarly, in *Burlington Industries v. Exxon Corporation,* supra, the court stated that the factors to be considered in deciding whether to compel disclosure are "(1) the importance of the information sought and (2) the difficulty the party seeking discovery will face in obtaining substantially equivalent information from other sources if discovery is denied." 65 F.R.D. at 43.

Cf. *Southern Railway Company v. Lanham,* 403 F.2d 119, 128 (5th Cir. 1969), reh. den. 408 F.2d 348 (1969) (employees who may be expected to be somewhat reluctant to answer fully questions which might have an adverse

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[5] Although the Company has said it will make its employees available for interviews, it has not agreed to bring them to the United States for this purpose. (Tr. 104-105)

effect on their employer); *McDonald v. Prowdley,* 38 F.D.R. 1 (W.D. Mich. 1965) (unavailability of witness or difficulty of access to a witness); *Wilson* v. *David,* 21 F.R.D. 217, 221-2 (W. D. Mich. 1957) (witness residing outside the jurisdiction of the court).[6]

I find that the record establishes ample necessity for compelling disclosure of the summoned material in this case, and that the work product doctrine does not shield the material from such disclosure.

**The Standards of Enforcement of the Summons**

The respondents claim that the standards necessary for judicial enforcement of an Internal Revenue summons as set forth in *United States v. Powell,* 379 U.S. 48 (1964) were not complied with. In *Powell,* the court stated:

> "He [the Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . ." *Id.* at 57.

The Court also held that the burden of showing an abuse of the court's process is on the taxpayer. *Id.* at 58.

The respondents do not claim that the administrative steps required by the Code have not been followed. They do claim, however, that the first three requirements enumerated in the quotation from *Powell* have not been satisfied.

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[6] These cases involved the disclosure of statements of employees under Rule 34 of the Federal Rules of Civil Procedure upon a showing of "good cause."

The claim that the summons was not issued for a legitimate purpose is clearly without merit. Respondents assert that the summons was issued solely for the purpose of a criminal prosecution, but this assertion is not substantiated by the record. On the contrary, the record establishes that no recommendation for prosecution had been made to the Department of Justice. It also established that the investigation was primarily a civil one and that no determination had been made as to whether the Company or anyone else should be prosecuted, although the possibility of criminal violation is always inherent in any such investigation. (Tr. 14-16, 37-38) In this connection, the Supreme Court in *Donaldson v. United States*, 400 U.S. 517 (1971) stated:

> "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. The regulations are positive. Treas. Regs. § 301.7602-1(c)(4), 26 CFR § 301.7602-1(c)(4). The underlying statutes are just as authoritative. Section 6659(a)(2) of the Code defines the term 'tax' as used in the Code and, hence, in the authorizing § 7602, to include any addition or penalty. Section 7602 contains no restriction; further, it has its ascertainable roots in the 1939 Code's § 3614 and, also, § 3615(a)-(c), which, by its very language and by its proximity to § 3616 and § 3654, appears to authorize the use of the summons for investigation into criminal conduct. There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. See *Mathis v. United States*, 391 U.S. 1, 4 (1968). To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law. See *United States v. Kordel*, 397 U.S. 1, 11 (1970).

> "We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution. *Id.* at 535-6.

Nor do I find anything in the record to justify the assertion that the summons was not issued in good faith. At most, the summons might be classified as having a dual purpose, which clearly would not render it improper. In *United States v. Held,* 435 F.2d 1361 (6th Cir. 1970), the court stated:

> "Even if the primary purpose of the summons was to further the criminal tax investigation, we believe the secondary purpose of determining appellant's civil tax liability would support the validity of the summons. . . ."
>
> "It is well settled that a § 7602 summons issued for an authorized purpose is entitled to enforcement even though it may produce evidence of criminal conduct on the part of the taxpayer. (Citations omitted)
> "Enforcement of the summons is not precluded by the possibility that it eventually might lead to a criminal prosecution." *Id.* at 1364-5.

See also *United States v. Haddad,* 527 F.2d 537 (6th Cir. 1975); *United States v. Weingarden,* 473 F.2d 454 (6th Cir. 1973).

Nor is there merit in the respondents' claim that the inquiry is not relevant to its purpose. In this connection, Special Agent Nowak testified:

> "Q. Why do you feel that you should have these documents, if I may add, rather than take the Upjohn Company's assurance as to what the relevance of those documents?

"A. Well, I feel that those files may contain evidence that would indicate that there is in fact a tax implication involved in payments which the Company has alleged have no U.S. tax implication. These files may provide leads or other evidence that would have a relationship to those payments that the Company does admit have a U.S. tax implication.

"I believe that it would—if it served no other purpose, it would help me corroborate the Company's position that there is no tax impact, if that is what the facts would show upon my investigation of the files.

"Q. So while it may be a conclusion that the Court has to draw, in your view the summoned documents were, at the time summoned and are today, necessary to your continuing investigation, is that correct.

"A. Yes, sir." (Tr. 14)

Respondents in their brief point to the fact that Agent Nowak used the word "may" in explaining what he was seeking, that is, evidence that "may" indicate tax implications or "may" provide leads to such evidence. It is noted that this is no less than the applicable statute, 26 USC § 7602, requires. The statute authorizes the Secretary to "examine any books, papers, records, or other data which *may* be relevant or material to such inquiry."

The Supreme Court has recognized the strong Congressional intent that the Revenue Service not be hindered in its investigation of taxpayers, and that the applicable statute "flatly imposes upon the Secretary the duty to canvass and to inquire." *Donaldson v. United States,* supra, 400 U.S. at 523. The test of relevancy was stated in *Foster v. United States,* 265 F.2d 183 (2nd Cir. 1959), cert. den. 360 U.S. 912 (1959), as follows:

"The test, we think, is essentially the same as that for materiality with respect to grand jury investigations.

(Citations omitted) It is whether the inspection sought 'might have thrown light upon' the correctness of the taxpayer's returns."

See also *United States v. Egenberg,* 443 F.2d 512, 515 (3rd Cir. 1971); *United States v. Harrington,* 388 F.2d 520, 523 (2nd Cir. 1968); *United States v. Auker* 325 F. Supp. 857 (S.D. N.Y. 1971).

In *United States v. Auker,* supra, the summons sought the production of the taxpayer's corporate minutes for several taxable years. The taxpayer (Standard Oil Company of New Jersey) argued that since not everything in the corporate minutes was relevant, it was not required to disclose all of its minutes. Therefore, it decided it "would make available for inspection all minutes which might have a bearing on the determination of Jersey's income tax liability." Thus, the taxpayer, like the Company here, undertook to decide for itself what was relevant, or more particularly what would affect or have a bearing on its tax liability. In rejecting this position, the court stated:

"The accountants, to be sure they see what is germane to their task, look at minutes that turn out not to be germane. They do not accept the views of others as to what they ought to examine, and the company does not expect them to do so. This makes sense for them. It makes equally good sense, *mutatis mutandis,* for the agents of the IRS.

"When we turn to the governing precedents, we discover what is not altogether extraordinary—that the dictates of good sense are in line with the law's commands. The cases show that the statutory provision for the examination of papers that '*may* be relevant or material'—properly viewed as a prediction about things yet unseen, not as a judgment about materials presented or offered for 'rulings'—has to mean what it quite simply says: that the demand may extend to

documents that 'might' throw light upon subjects under legitimate inquiry. . . . The agents of the IRS cannot and they need not guarantee that everything they wish to see *will* be relevant or material to their inquiries any more than Jersey's accountants can do for theirs." 325 F.Supp. at 861-2.

Respondents also complain of the fact that the summons shows on its face that it relates to the tax liability of the Company for the years 1972, 1973, and 1974; yet the summons seeks information regarding questionable payments "since January 1, 1971." Special Agent Nowak explained the reason for the time span as follows:

"Q. Mr. Nowak, you have been sworn, of course. Some comment has been made about the years '71 and '75 with respect to this Summons. Would you briefly explain the relevance and necessity for those documents and the other information sought with respect to your investigation, which is currently for '72 through '74?

"A. Well, in relation to 1975, the fact that there has been a Schedule M adjustment indicates that there is an item that the Internal Revenue Service ought to check to make sure the adjustment has been treated properly. And, in addition, the Government's position, the Internal Revenue Service's position has always been clearly stated that while the investigation covered the years 1972 through 1974 we were not precluded in opening up going into the 1975 were we to find indications of possible criminal or civil ramifications in these payments. And in regard—we could also have the option of going back to 1971, if we wanted to. Another possible relevancy for that material, especially 1971, is the possibility of transactions occurring in one year and not being recorded on the books and records of the Company in that year, but for various reasons, through error or otherwise being recorded in another

year, so we would have to make sure that transactions were properly reflected in the year that they occurred." (Tr. 51-52)

The limited disclosures which the Company voluntarily made to the SEC and the IRS covered the period "since January 1, 1971." Under the circumstances, it was reasonable for the Revenue Service to request information for a period at least as long as that covered by the Company's disclosures.

Respondents also point to the fact that on November 28, 1977, the Internal Revenue Service issued a Revenue Ruling which, they claim, holds that illegal bribes and kickbacks made by a foreign subsidiary properly reduce the earnings and profits of that subsidiary, and, in effect, do not have an impact on the United States tax return of the parent. Rev. Rul. 77-442, 1977-48 I.R.B. 10. This, of course, does not answer the basic question, whether the respondents can unilaterally decide for themselves whether the questionable payments fall within the ambit of the ruling. Moreover, the Company's own tax expert, David S. Creamer, who is the Manager of the Company's Corporate Tax Planning Unit, candidly conceded that there are various situations in which the arrangements between a domestic parent and a controlled foreign corporation could have an impact on the parent's federal income tax return. (Tr. 141-143)[7] The Revenue Service should be able to determine for itself whether any of the questionable payments were made under circumstances or arrangements which would trigger tax consequences.

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[7] One example cited was where a controlled foreign company creates an off-book account, not shown on its records, from which it disburses funds in the foreign country for the benefit of the American parent. This, the witness testified, would have an impact on the domestic tax return of the parent as a constructive dividend. (Tr. 141)

The respondents also claim that the summons should not be enforced because the "information sought is . . . . . already within the Commissioner's possession." *United States v. Powell*, supra, 379 U.S. at 57. Respondents misconstrue the quoted words, which obviously refer to the data sought by the summons itself. Clearly, respondents' failure to provide the data specified in the summons is the reason this enforcement proceeding was instituted. The information which is "already within the Commissioner's possession" is simply that which the respondents have unilaterally chosen to reveal to him. As set forth above, the Commissioner desires additional information, and he is not bound to accept the respondents' determination of relevancy at face value.

Finally, respondents claim in their brief that the summons here constitutes nothing more than a "fishing expedition." If this be so, this claim was fully answered in *United States v. Giardano*, 419 F.2d 564, 568 (8th Cir. 1970):

> "Taxpayer in his brief characterized the Government's efforts as a 'fishing expedition.' If so, the Secretary or his delegate has been specifically licensed to fish by § 7602."

For the reasons herein stated, I find that the summoned material is not shielded from disclosure by the attorney-client privilege, nor by the work product doctrine, and that the standards required for judicial enforcement of the summons have been met. Therefore, I respectfully recommend that an order be entered compelling the respondents to comply with its terms.

/s/ Stephen W. Karr
Stephen W. Karr,
United States Magistrate

Dated: February 23, 1978

[Filed: March 23, 1978]

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
666 FEDERAL BUILDING
GRAND RAPIDS, MICHIGAN 49502

March 7, 1978

STEPHPN W. KARR
MAGISTRATE

The Honorable Noel P. Fox
Chief Judge
411 Federal Building
Grand Rapids, Michigan 49503

Re: United States v. Upjohn Company, et al.
No. K77-7 Misc. CA 4

Dear Judge Fox:

I submitted my Report and Recommendation in the above-captioned matter on February 23, 1978.

The February 28, 1978 issue of United States Law Week, which arrived here on March 3, reports on a recent decision of the Eighth Circuit dealing with the attorney-client privilege in a factual situation somewhat similar to the Upjohn case. The case is *Diversified Industries, Inc. v. Meredith*, 46 L.W. 2435, apparently decided on February 15, 1978. A copy of the Law Week report of the decision is attached.

The Eighth Circuit opinion was brought to my attention by Mr. Wallson Knack, who is Upjohn's local counsel in this matter. He telephoned me and asked whether I thought a motion for reconsideration would be appropriate in view of that opinion. I had not seen the opinion, and suggested that it might expedite a final decision in this case if he would simply bring the opinion to the court's attention when filing his objections to my Report and Recommenda-

tion, rather than filing a motion for reconsideration before me.

I have now read the Law Week report of the Eighth Circuit decision, and, on second thought, I believe it would be appropriate for me to give my views on the decision both to the court and to counsel. I am sending a copy of this letter to all counsel. On Mr. Knack's motion, I have heretofore extended the time for filing objections to my Report and Recommendation to March 10, 1978. I am hereby extending such time to March 17, 1978, in the event counsel believe this letter requires further comment on their part.

You will note that the Eighth Circuit opinion states that the Federal courts have developed two tests to deal with the problem of when a corporate employee's conversations with the corporation's attorney are protected by the attorney-client privilege. First is the "control group" test under which an employee statement is not considered a corporate communication unless the employee is in a position to control or to take a substantial part in a decision about any action that the corporation may take upon the advice of the attorney. Under the second test, the employee's communications are privileged where the employee makes the communication at the direction of a corporate superior and where the subject matter concerns the performance of the employee's duties.

I also referred to these tests in my Report and Recommendation (pages 9-11). After reviewing and analyzing the two tests, I concluded;

> "In view of the overwhelming acceptance of the control group test, I have concluded that it should be followed in this case." (Page 11)

The Eighth Circuit opinion states that both tests are subject to criticism and therefore adopts a third test. It holds that the attorney-client privilege is applicable to an

employee's communication if: (1) the communication is made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those who, because of the corporate structure, need to know its contents. The corporation, the court adds, has the burden of showing that the communication meets all of these requirements.

In my opinion, this new test, which purports to be a modification of the second test, has the same infirmities of the second test as pointed out in my Report and Recommendation (page 11):

> "[The second test] would exclude virtually nothing from its sweep and flies in the face of the well-established principle that the privilege 'should be strictly confined within the narrowest possible limits consistent with the logic of its principle.' *United States v. Goldfarb,* supra." [328 F.2d 280, 282 (6th Cir. 1964)

I also note that the Eighth Circuit opinion was not a unanimous one. The dissent noted that the investigation of the attorneys there involved was primarily a factual one that could have been performed just as readily by non-lawyers, aided to the extent necessary by a firm of public accountants. The dissent concluded that neither the investigation which involved the question of whether the corporation had engaged in certain illegal practices during proxy fight litigation, nor the making of the recommendations based thereon amounted to the performance of legal services or the giving of legal advice. The same could be said of the present case, which involved the question of

whether the corporation had engaged in certain illegal practices in soliciting business in foreign countries.

I note also that the Eighth Circuit test requires that the communication be not disseminated beyond those persons who, because of the corporate structure, need to know its contents. This would appear to incorporate the waiver doctrine, which I discussed in my Report and Recommendation (pages 12-14). As I stated there, Upjohn's disclosures to the SEC, as well as the IRS, and its agreement to furnish the SEC with any additional data it might request, should be deemed a waiver of the attorney-client privilege, if indeed it ever existed.

I adhere to the conclusions reached in my Report and Recommendation.

Very truly yours,

/s/ Stephen W. Karr
Stephen W. Karr
United States Magistrate

SWK:rl
cc: All Counsel

THE UNITED STATES LAW WEEK
The Bureau of National Affairs, Inc., Washington, D.C.

Volume 46, No. 33

February 28, 1978

## NEW COURT DECISIONS

### Significant Opinions Not Yet Generally Reported

Attorneys

PRIVILEGE—

Law firm's confidential interviews with corporate employees who were instructed to cooperate with firm's investigation, requested by corporation, of possibly illegal corporate practices are protected by attorney-client privilege even though employees are not in position to control or take substantial part in decision about any action corporation may take based on law firm's advice.

During proxy fight litigation, facts surfaced indicating that the corporation may have engaged in certain illegal practices. As a result, the corporation's board of directors passed a resolution engaging the services of the law firm to conduct an investigation into the disclosures and to make a report to the board. Employees were instructed to cooperate fully with the firm's investigation. During the course of the investigation, the law firm interviewed several employees, including some who were not in a position to control or take a substantial part in any decision the corporation might make based on the law firm's advice. One law firm's report summarized these interviews, analyzed data, evaluated the conduct of certain employees, drew conclusions as to the propriety of their conduct, and made recommendations as to the steps the corporation should take. Now, in a lawsuit against the corporation, the plaintiff is seeking disclosure of the report; the corporation claims that the report is protected by the attorney-client privilege.

The court must determine the circumstances in which employee communications can be classified as the corporate client's communications. Two tests have developed. First is the "control group" test. In this test, an employee's statement is not considered a corporate communication unless the employee is in a position to control or even to take a substantial part in a decision about any action that the corporation may take upon the advice of the attorney. This is the most widely used test. The second test protects the communication if the employee, though not a member of its control group, is directed by a corporate superior to make the communication and the communication concerns the performance of the employee's duties.

The control group test has come under increasing criticism because it attempts to equate corporate clients with individual clients. Before an employee's communication will be deemed the corporate client's communication, the control group test demands that the employee communicate to the attorney and be in a position to control or play a substantial role in any decision based on the attorney's advice. In practice, this results in protecting only communications of top level executives and this fails to take into account the realities of corporate life. It may be necessary to glean information relevant to a legal problem from middle management and non-management personnel as well as from top executives. The control group test inhibits the free flow of information to a legal advisor in these circumstances and defeats the purpose of the attorney-client privilege. Thus, the court concludes that the control group test is inadequate for determining the extent of a corporation's attorney-client privilege.

The second test provides a more reasoned approach by focusing upon why an attorney was consulted rather than with whom the attorney communicated. But this test also has its critics since it can result in shielding data from the discovery process. Critics fear that many corporations will

attempt to funnel most corporate communications through their attorneys in order to prevent subsequent disclosure.

Judge Weinstein, in his text on evidence, suggests several modifications of this second test in order to substantially limit whatever potential for abuse the test presents.

[Text] We feel that the limitations suggested by Judge Weinstein have merit and that the attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. We note, moreover, that the corporation has the burden of showing that the communication in issue meets all of the above requirements. [End Text]

The employee interviews conducted here are within the scope of the attorney-client privilege as it is defined by these standards. The communications were made for the purpose of securing legal advice. The law firm was given complete autonomy to conduct a professional investigation and inquiry, it was authorized to procure such assistance as reasonably required, and it was authorized to interview any employee who might have knowledge of the facts. Most importantly, it was given authority to analyze data, to evaluate and draw conclusions as to the propriety of past actions, and to make recommendations for possible future courses of action. The application of the attorney-client privilege to this matter and others like it will encourage corporations to seek out and correct wrong-doing in their own house and to do so with attorneys who are obligated to conduct the inquiry in an independent and ethical

manner. The remaining requirements of the Weinstein test have also been met. All corporate employees were specifically instructed to cooperate and the interviews explored only areas within the bounds of the employees' corporate duties. Finally, the corporation scrupulously avoided disseminating this information to other than those immediately concerned with the results.—Heaney, J.

Dissent. The majority's premise that the corporation employed the law firm as its attorney to give it legal advice cannot be accepted. The firm was employed to make a factual investigation and business recommendations in such areas as the results of the investigation might suggest. The firm did just that. The work it performed could have been performed just as readily by nonlawyers, aided to the extent necessary by a firm of public accountants. Thus, one of the primary requisites of a successful claim of attorney-client privilege never came into existence. Neither the investigation nor the making of the recommendations based thereon amounted to the performance of legal services or the giving of legal advice.—Henley, J.

Dissent. This controversy is moot and thus there is no reason to reach the merits. Although reluctant to express an opinion on the merits, I agree in the main with the dissenting views of Judge Henley.—Bright, J.

—CA 8 (en banc); Diversified Industries, Inc. v. Meredith, 2/15/78.

[Filed: March 23, 1978]

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
666 FEDERAL BUILDING
GRAND RAPIDS, MICHIGAN 49502

March 13, 1978

STEPHEN W. KARR
MAGISTRATE

The Honorable Noel P. Fox
Chief Judge
411 Federal Building
Grand Rapids, Michigan 49503

Re: United States v. Upjohn Company, et al.
No. K77-7 Misc. CA 4

Dear Judge Fox:

I have received a copy of the Respondents' Motion for Reconsideration and Objection to Report and Recommendation of Magistrate, which was filed on March 8, 1978, and I have reviewed the supporting brief and the Eighth Circuit opinion in *Diversified Industries Inc. v. Meredith*, 46 L.W. 2435, which forms the basis of the motion.

I assume the Motion for Reconsideration is directed to me. To the extent that it is, I believe that my letter to you under date of March 7, 1978, a copy of which was sent to all counsel, is a sufficient disposition of that motion. In my letter, I discussed the *Meredith* opinion as reported in Law Week, and concluded that I should adhere to the conclusions reached in my original Report and Recommendation for the reasons expressed in my letter. I have now reviewed the full text of the *Meredith* opinion, including the three dissents, and I still see no reason to depart from my original conclusions. The only additional comment I would make is that, although the respondents'

brief appears to question my conclusion that there has been overwhelming acceptance of the "control group" test (Respondents' brief, page 5), the *Meredith* opinion confirms that it is the "most widely used test" and that it "predominates" (*Meredith,* slip opinion, page 6). This, of course, is not in itself a sufficient basis for choosing it over the "subject matter" test. As stated in *Meredith,* each test has its critics (slip opinion, pages 6, 8). *Meredith* purports to adopt a third test which it states to be a modification of the "subject matter" test. As I stated in my letter of March 7, 1978, I find in this new test the same basic infirmities of the "subject matter" test discussed in my Report and Recommendation, and which led me to reject it in favor of the "control group" test.

I adhere to the conclusions reached in my Report and Recommendation.

Very truly yours,

/s/ Stephen W. Karr
Stephen W. Karr
United States Magistrate

SWK:rl
cc: All Counsel

[Filed: April 28, 1978]

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

K77-7 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioners,*

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
*Respondents.*

**ORDER**

Magistrate Karr submitted to me his Report and Recommendation in the above matter on February 23, 1978. I promptly read the report and the briefs submitted by the parties and agreed with the Report and Recommendation.

The February 28, 1978 issue of U.S. Law Week, which arrived on March 3, 1978, reports on a recent decision of the Eighth Circuit Court of Appeals dealing with the attorney/client privilege in a factual situation somewhat similar to the Upjohn case. That case is *Diversified Industries Inc.* v. *Meredith,* 46 L.W. 2435, apparently decided on February 15, 1978. A copy of the decision was attached to a letter-amendment to the Magistrate's Report and Recommendation submitted on March 7, 1978.

I have carefully read and considered *Diversified Industries, Inc.* v. *Meredith,* supra, cited by Magistrate Karr in his letter-amendment of March 7, 1978, and his further letter-amendment of March 13, 1978. I find the Magistrate's Report and Recommendation is an excellent opinion

and is the prevailing law. Therefore, I hereby accept as the opinion of this court the Magistrate's Report and Recommendation.

IT IS SO ORDERED.

/s/ ILLEGIBLE
Chief Judge, U.S. District Court
Western District of Michigan

Dated: April 28, 1978.

ILLEGIBLE
ILLEGIBLE

/s/ By MARY HAMTAK
Deputy Clerk

April 28, 1973

[Filed: May 16, 1978]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. K77-7 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Petitioners,*

v.

THE UPJOHN COMPANY and GERARD THOMAS,
Vice President, Secretary and General Counsel,
*Respondents*

**ORDER AND FINAL JUDGMENT**

May 16, 1978

This Court having considered the record in this case as developed before the Magistrate, and having issued an order on April 28, 1978, accepting the Magistrate's Report and Recommendation that the summons be enforced, it is now therefore

ORDERED that the respondents, The Upjohn Corporation and Gerard Thomas, on May *30th*, 1978, at 9:00 a.m. at the office of the Intelligence Division, Internal Revenue Service, Room B-47, Federal Building, 410 W. Michigan Avenue, Kalamazoo, Michigan, obey the summons served upon them on November 23, 1976, and each and every requirement thereof, by testifying and producing all of the books, records, papers and other data set forth in the summons and referred to in the Petition to Enforce Internal Revenue Service Summons.

/s/ NOEL P. FOX
Chief United States District Judge

DATED: 5/15/78
ILLEGIBLE
ILLEGIBLE
/s/ By G. E. LARRICK
Deputy Clerk

THE OPINION OF THE COURT OF APPEALS
IS REPRODUCED AT APPENDIX A
OF THE PETITION FOR CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 79-886

UPJOHN COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.

**ORDER ALLOWING CERTIORARI**

Filed March 17, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

No. 79-886

# In the Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE FEDERAL RESPONDENT


WADE H. MCCREE, JR.
*Solicitor General*

M. CARR FERGUSON
*Assistant Attorney General*

STUART A. SMITH
*Assistant to the Solicitor General*

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*Washington, D.C. 20530*

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# In the Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-886

THE UPJOHN COMPANY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AND THE FEDERAL RESPONDENT

### OPINIONS BELOW

The opinion of the United States Magistrate (Pet. App. B), which was adopted by the district court (Pet. App. C), is not officially reported. The opinion of the court of appeals (Pet. App. C) is reported at 600 F.2d 1223.

### JURISDICTION

The judgment of the court of appeals was issued on June 28, 1979 (Pet. App. F). On September 10, 1979, the court of appeals denied a petition for rehearing, with suggestion for rehearing en banc (Pet. App. E).

The petition for a writ of certiorari was filed on December 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects against the compelled disclosure of communications between an attorney employed by a corporation and the corporation's employees only when such employees play a substantial role in directing the corporation's response to the legal advice sought.

2. Whether the work product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947), protects against compelled disclosure of documentary evidence sought by an internal revenue summons where the Internal Revenue Service shows necessity for disclosure.

## STATEMENT

1. During an audit of petitioner The Upjohn Company's consolidated federal income tax returns for 1972 and 1973, the Internal Revenue Service discovered that since January 1, 1971, Upjohn and its subsidiaries had made payments of approximately $4.4 million to officials of many of the 136 foreign countries in which they conduct business (Pet. App. A 2a). It appeared that these payments were in the nature of bribes or kickbacks paid to foreign government employees to influence their action. The fact of such improper payments was apparently known by certain of Upjohn's inside directors and officers asso-

ciated with its international operations (Pet. App. B 12a).

Prior to the commencement of the Service's investigations, Upjohn had directed its in-house counsel (petitioner Gerard Thomas, who served as Upjohn's vice-president, secretary, and general counsel), along with outside counsel, to conduct an internal investigation of these improper or questionable foreign payments. This internal investigation was prompted, in part, by Upjohn's concern that it had not properly reported the payments to the Securities and Exchange Commission. Upjohn thereafter filed two reports with the S.E.C., voluntarily disclosing detailed information with respect to some, but not all, of the questionable payments. Upjohn made these disclosures in the hope of obtaining lenient treatment by the S.E.C. Upjohn also made the reports available to the Internal Revenue Service, which then commenced its investigation of the matter to determine the federal income tax consequences of the payments (Pet. App. A 2a).

Upjohn provided the Internal Revenue Service with details of $700,000 worth of the payments which it conceded might affect its federal income tax liability. However, it furnished the Service with considerably less detailed information with respect to the other $3.7 million of questionable payments, claiming that the remaining portion did not affect its tax liability. Although Upjohn made its employees available for questioning by the Service, it refused to permit them to answer questions about the $3.7 million of questionable payments (Pet. App. A 2a).

Because Upjohn's limited disclosure with respect to $3.7 million of the improper payments was inadequate to permit an independent evaluation of their tax consequences, the Internal Revenue Service sought production from Upjohn's general counsel of the documents generated in the course of the internal investigation. Those documents were in part responses by 53 of the company's foreign general and area managers to written questionnaires prepared by the general counsel. In addition, the documents consisted of written notes made by the general counsel and two outside counsel of telephone or personal interviews of all corporate employees to whom the foreign payment questionnaire had been sent, as well as 33 other employees who had not received a questionnaire (Pet. App. A 2a; Pet. App. B 13a).

Upon Upjohn's refusal to make available the corporate documents generated in its internal investigation of the improper foreign payments, Special Agent David E. Nowak of the Internal Revenue Service issued a summons to the company and its general counsel to appear and testify concerning Upjohn's tax liability for 1972-1974. The summons directed petitioners to produce "[a]ll files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made * * * since January 1, 1971 * * *" (Pet. App. B 9a, 11a).

Petitioners refused to produce the records sought by the summons on the grounds that they were protected

by the attorney-client privilege and the work product doctrine. Pursuant to 26 U.S.C. 7402(b) and 7604(a), the United States and Special Agent Nowak commenced this proceeding to enforce the summons in the United States District Court for the Western District of Michigan. The case was referred to a magistrate who, after holding a hearing, found that "the summoned material is not shielded from disclosure by the attorney-client privilege, nor by the work product doctrine, and that the standards required for judicial enforcement of the summons have been met" (Pet. App. B 37a). He therefore recommended that the summons be enforced (*ibid.*). The district court adopted the magistrate's recommendation and ordered the summons enforced (Pet. App. C 39a-40a; Pet. App. D 41a-42a).

2. The court of appeals affirmed in part, reversed in part, and remanded the case to the district court for further findings of fact (Pet. App. A 1a-8a). It agreed with the district court that the scope of the attorney-client privilege in the context of communications between in-house counsel and corporate employees was limited to the "control group" of the corporation, *viz.*, those senior officers who play a substantial role in directing the corporation's response to the legal advice given. In so holding, it rejected petitioners' claim that the applicability of the privilege should be governed by the "subject matter" test. Pursuant to this test, if the corporate employee possesses information acquired in the ordinary course of business relating to the subject matter of his employ-

ment and the information is communicated confidentially to corporate counsel to assist him in giving legal advice to the corporation, then the communication is privileged (Pet. App. A 4a-7a). In the court of appeals' view, the "subject matter" test would "encourage corporate managers to shield themselves from information about possibly illegal transactions" (*id.* at 5a-6a) and create a "broad 'zone of silence' " (*id.* at 7a).

However, because the record indicated that some of the communications sought by the summons were made by senior corporate officers who were in all likelihood members of the "control group," the court of appeals remanded the case to the district court for further findings and to deny enforcement of the summons to these "control group" communications (Pet. App. A 7a).

3. The court of appeals also rejected petitioner's claim that the documents sought by the summons were protected by the work product doctrine. It left undisturbed the district court's finding (Pet. App. B 30a) that "the record establishes ample necessity for compelling disclosure of the summoned material in this case, and that the work product doctrine does not shield the material from such disclosure." However, the court of appeals also expressed the view that "[t]he work product doctrine of *Hickman* v. *Taylor* [329 U.S. 495 (1947)] and Fed. R. Civ. P. 26(b)(3) is not applicable to administrative summonses issued under 26 U.S.C. 7602" (Pet. App. A 7a n.13). As the court of appeals concluded, "[t]he IRS simply must

show that the inquiry is relevant to a good faith investigation conducted pursuant to a legitimate purpose, that the information sought is not in the IRS' possession and that proper administrative procedures have been followed. *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964)" (*ibid.*).

## DISCUSSION

1. The courts of appeals have divided over the proper scope of the attorney-client privilege in the context of communications from corporate employees to the corporation's counsel. Under the "control group" test, applied by the court below in the instant case, the privilege is limited to communications from those senior officers or employees who control or play a substantial role in any decision the corporation may make as a result of the advice of counsel. This test has been adopted, as well, by both the Tenth Circuit in *Natta* v. *Hogan*, 392 F.2d 686 (1968) and the Third Circuit in *In re Grand Jury Investigation (Sun Company, Inc.)*, 599 F.2d 1224 (1979). Accord: *United States* v. *Amerada Hess Corporation*, No. 79-1317 (3d Cir. Jan. 18, 1980), slip op. 12.[1]

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[1] See *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), petition for mandamus and prohibition denied, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963). See also *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963); *United States* v. *International Business Machines Corp.*, 66 F.R.D. 154 (S.D.N.Y. 1974).

Two other circuits, however, have applied a broader privilege under the so-called "subject matter" test. Under this approach, first announced in *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), aff'd by an equally divided Court, 400 U.S. 348 (1971), the communication is privileged without regard to the employee's place within the corporate hierarchy if it is made by the employee at the direction of his superiors and the subject matter of the communication concerns the performance of the employee's duties. In *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc), the court adopted the subject matter test with the modification that the employee's communications must have been for the purpose of securing legal advice (see 572 F.2d at 609).

We agree with petitioners (Pet. 9) and the various amici curiae that review by this Court is warranted to resolve the conflict among the courts of appeals. The issue is important not only for the enforcement of the internal revenue laws but could also arise in other disputes between a federal agency and a corporation. Moreover, as the decisions of the lower courts demonstrate, the question is significant as well in the context of private litigation. Hence, we do not oppose the petition with respect to the first question presented in order to establish a uniform rule with respect to the attorney-client privilege.[2]

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[2] Rule 501 of the Federal Rules of Evidence states that in the absence of any constitutional or statutory provision or

2. The court of appeals also rejected petitioners' claim that the documents sought by the Internal Revenue Service were covered by the qualified privilege of the work product rule of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). There, this Court held that information gathered by an attorney in anticipation of litigation is privileged from compelled disclosure unless the party seeking production can show necessity or that denial of discovery would unduly prejudice the preparation of his case or cause him any hardship or injustice.

Here, the court of appeals held that the work product doctrine does not apply to an administrative

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judicial rule, "the privilege of a witness * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The federal courts have accordingly looked to "federal common law" in determining the scope of evidentiary privileges in summons enforcement proceedings or in analogous grand jury proceedings. See, *e.g.*, *United States* v. *Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); *Colton* v. *United States*, 306 F.2d 633, 636 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963). See also *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373, 379 (3d Cir. 1976); *In re Special April 1977 Grand Jury*, 581 F.2d 589, cert. denied, 439 U.S. 1046 (1978); *United States* v. *Holmes*, 594 F.2d 1167, 1171 (8th Cir. 1979); *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977).

Thus, this Court's resolution of the conflict among the circuits with respect to the question presented involving the attorney-client privilege will establish a uniform rule for summons enforcement and grand jury proceedings, federal criminal cases, and other cases involving claims arising under federal statutes.

summons issued by the Internal Revenue Service (Pet. App. A 7a-8a n.13). With respect to this question, the courts of appeals have expressed disparate views as to whether the doctrine applies in a summons enforcement proceeding (see *United States* v. *Nobles*, 422 U.S. 225, 247 n.6 (1975) (White, J., concurring)). Compare *United States* v. *McKay*, 372 F.2d 174, 176 (5th Cir. 1967) ("relevancy of the work product privilege enunciated in the *Hickman* case to a proceeding for the enforcement of the Commissioner's summons may well be doubted"), with *United States* v. *Brown*, 478 F.2d 1038, 1041 (7th Cir. 1973) ("work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons").[3] Recently, the Third Circuit expressed agreement with *Brown*, although it enforced the summons on the ground that the government had made the requisite showing of necessity because the work product in question was of minimal substantive content. *United States* v. *Amerada Hess Corp.*, *supra*, slip op. 14-16.[4]

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[3] In *McKay*, the court also held that the appraisal report at issue was in no sense the work product of a lawyer (see 372 F.2d at 177). In *Brown*, the court ruled that the Commissioner had shown sufficient cause to rebut the taxpayer's work product claim (see 478 F.2d at 1041).

[4] The Internal Revenue Service summons authority has been analogized to the grand jury subpoena. See *United States* v. *Powell*, 379 U.S. 48 (1964); *United States* v. *Bisceglia*, 420 U.S. 141 (1975). The Second, Third, and Eighth Circuits

Here, the district court found (Pet. App. B 28a-30a) that the Internal Revenue Service had shown ample necessity for compelling disclosure of the summoned material. Even if applicable, therefore, petitioners' work product claim has been rebutted in this case. In these circumstances, we do not believe there is a true conflict among the circuits on the question whether the materials at issue are protected from disclosure by the work product rule, since no court of appeals has indicated that it would uphold a work product claim on these facts to defeat the enforcement of an Internal Revenue summons.[5] Hence, if the work product claim were the only question presented by the petition, we would oppose certiorari. However, in light of the fact that both questions presented involve closely related claims of privilege with respect

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have held that the work product rule is applicable to a grand jury subpoena. See *In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc.*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Investigation (Sun Company, Inc.)*, 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1973).

[5] In *In re Grand Jury Investigation (Sun Company, Inc.)*, *supra*, the Third Circuit held that similar materials sought by a grand jury subpoena were protected by the work product doctrine, and that the government had demonstrated good cause to overcome that protection with respect to questionnaires and interview memoranda generated by a deceased employee of the corporation because of the government's inability to secure the information from any more reliable source. However, the court deferred ordering production of all of the other materials sought until the government had subpoenaed witnesses before the grand jury (see 599 F.2d at 1228-1233).

to the identical material, we do not oppose granting the petition as to the work product question in the event the Court grants certiorari on the first question involving the attorney-client privilege.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 79-886

# In the Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY, ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## MEMORANDUM OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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RESPONDENTS

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**MEMORANDUM OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE***

The American Bar Association, with the consent of the parties, submits this memorandum *amicus curiae* in support of the petition for a writ of certiorari.

## INTEREST OF THE AMERICAN BAR ASSOCIATION

The petition for a writ of certiorari raises two issues of peculiar significance to lawyers: (1) the scope of the attorney-client privilege as applied to communications made to a lawyer by the officers and employees of a corporate client; and (2) the extent to which a lawyer's work product on behalf of a client may be subject to administrative discovery. Issues of confiden-

tiality such as these go to the heart of the relationship between lawyer and client, and they bear importantly upon the lawyer's role in the administration of justice. Continued uncertainty with respect to these issues will impede the efforts of lawyers to provide responsible, effective representation and to give the informed guidance necessary to ensure compliance with the law. It therefore is of central concern to the organized bar, and to the legal profession generally, that the questions presented in the petition be given prompt, authoritative resolution and that they be decided with the views, needs, and responsibilities of the profession in mind.

## ARGUMENT

1. *The attorney-client privilege, as applied to corporate clients, should not be restricted solely to communications made by members of the corporation's control group.* The court of appeals in this case held that the attorney-client privilege, as it applies to corporate clients,[1] protects only communications made by those relatively senior corporate executives who decide how the corporation will act in response to the advice of counsel. In so holding, the court emphasized and enlarged a continuing conflict among the circuits. Two other courts of appeals previously had endorsed the "control group" test adopted by the court below. *See In re Grand Jury Investigation*, 599 F.2d 1224, 1237 (3d Cir. 1979); *Natta* v. *Hogan*, 392 F.2d 686, 692 (10th Cir. 1968).[2] On the other hand, two courts of

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[1] It has long been understood that the attorney-client privilege applies to corporate clients. *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). *See also, e.g.*, United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915).

[2] Under the "control group" test, the attorney-client privilege extends only to communications between counsel and corporate officers or employees who have "the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer or is an authorized member of a group that has such power." Natta v. Hogan, 392 F.2d at 692. *See also* City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).

appeals have rejected that test, adopting instead a less restrictive view of the attorney-client privilege. *See Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596, 609 (8th Cir. 1978) *(en banc); Harper & Row Publishers, Inc.* v. *Decker,* 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd by an equally divided vote,* 400 U.S. 348 (1971).[3]

The very existence of a conflict, which results in litigants in different circuits being subjected to different rules, is of course sufficient cause for review of this case on certiorari. Sup. Ct. R. 19(1)(b). The conflict represented by this case, moreover, stands in special need of resolution, for corporations with nationwide activities at present are left with no adequate means of determining in advance whether communications that officers and employees make to counsel will be afforded the protection of the attorney-client privilege. Furthermore, as this Court recognized in granting certiorari in *Harper & Row,* correct delineation of the scope of the attorney-client privilege as applied to corporate clients also is a matter of manifest public importance affecting both the legal profession and the administration of justice.

In addition, *amicus* submits that this case was decided incorrectly by the court of appeals. The purpose of the attorney-client privilege "is to encourage clients to make full disclosure to their attorneys." *Fisher* v. *United States,* 425 U.S. 391, 403 (1976). *See also Radiant Burners, Inc.* v. *American Gas Ass'n,* 320 F.2d at 322. Such full disclosure obviously is in the interest of both lawyer and client. The competent attorney cannot render sound legal advice or provide effective representa-

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[3]Under the "subject matter" test adopted in *Harper & Row,* "an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." Harper & Row Publishers, Inc. v. Decker, 423 F.2d at 491-92. The Eighth Circuit in *Diversified Industries* adopted a "modified *Harper & Row* test." Diversified Industries, Inc. v. Meredith, 572 F.2d at 608.

tion unless he has thorough knowledge of all relevant facts, including both the actions his client has taken and the information upon which his client acted. These facts can best, and in most instances only, be learned directly from the client. "If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States* v. *Louisville & Nashville R.R.*, 236 U.S. at 336. *See also Connecticut Mutual Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, 458 (1876). Consequently, this Court has long understood that "it is indispensable for the purposes of private justice," *Chirac* v. *Reinecker*, 24 U.S. (11 Wheat.) 280, 294 (1826), that "the apprehension of compelled disclosure by the legal advisers . . . be removed." 8 Wigmore, *Evidence* § 2291 at 545 (McNaughton rev. 1961).

The full disclosure promoted by the attorney-client privilege also serves the larger societal interest of "encourag[ing] adherence to the law." Miller, *The Challenges to the Attorney-Client Privilege*, 49 Va. L. Rev. 262, 270 (1963). This is especially true with regard to corporate clients. If disclosures may be made in confidence, counsel is better able to investigate allegations of wrongdoing within the corporation, determine the legal implications of past actions, and advise on how to avoid future violations.

The narrow compass given to the attorney-client privilege by the court of appeals below frustrates the privilege's central purpose of encouraging full disclosure to counsel. The "control group" test adopted by the court of appeals directly inhibits disclosure by exposing to discovery the very communications that counsel would find to be of greatest assistance. "In practice, [the "control group" test] results in protecting only communications of top level executives which fails to take into account the realities of corporate life." *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d at 608. A corporation's senior executives rarely will be in the best position to inform counsel concerning specific factual details on which legal issues may turn. First-hand knowledge of the relevant facts usually is possessed by middle-level executives or operating personnel. These are the employees from whom counsel must acquire the

information upon which his advice will be based, yet the "control group" test discourages the corporation from asking them to make a full disclosure.

Moreover, as a practical matter much of corporate counsel's day-to-day legal advice is rendered to employees considerably below the level of senior management. This is so for at least two reasons. First, it is more efficient, and more effective, to give legal advice directly to those whose conduct is to be guided thereby, and that frequently means operating personnel far removed from the boardroom. Second, " 'middle management executives who probably do not qualify for inclusion in the control group . . . have responsibilities for making recommendations which are ratified verbatim by the higher echelon management. . . .' In fact, middle management may include the parties whose statements most need protection because these men frequently are the real decision makers." Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 Mich. L. Rev. 360, 373 (1970). To inhibit disclosures by and communications with middle management and operating personnel therefore strikes at the very heart of the relationship between corporate counsel and his client.

The "control group" test operates indirectly as well as directly to inhibit full disclosure of relevant facts to counsel. "From the lawyer's viewpoint, the underlying policy of assuring a client that his communications will remain confidential will be served only if the lawyer is able to predict, with reasonable reliability, that a particular communication will be held by a court to be privileged." *Id.* at 375. But the consequence of the "control group" test is that each time an attorney is asked for advice by a corporate client, he must first inquire into the position, status, and responsibility of the corporate employee making the request in order to determine whether the employee is within the requisite control group. The answer may not always be clear; the employee may have some authority but not necessarily enough.[4] And a determination made when the

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[4] The attorney thus is presented with a practical difficulty at the outset. He may be forced to make an initial investigation into a matter having little or nothing to do with the legal issue with respect to which his advice

request or communication occurs may not withstand the passage of time: since the identity of the group empowered to decide the corporation's course of action depends not only upon the nature but also upon the significance of the matter to be decided, its membership cannot always be known with certainty at the time facts are marshalled and advice given. Thus, counsel may not rely with confidence on the availability of the attorney-client privilege with respect to communications on matters that may possibly grow in significance over time.[5] This uncertainty over the scope of the privilege as applied to particular communications could discourage even disclosures that otherwise might later have been recognized as privileged.

The "control group" test confronts counsel with a painful and unfair dilemma: he must either render advice and provide representation on the basis of inadequate knowledge of the facts or obtain such knowledge at the risk of becoming a discovery tool for opposing parties. The dangers of proceeding without a full understanding of the facts are manifest. The lawyer has an obligation to inquire fully into the corporate actions and other facts that bear upon the advice he has been requested to give. Yet, if the "control group" test applied, the lawyer would need to advise the control group (assuming that it could be identified) of the hazards of making inquiries that would fall outside the protection of the attorney-client privilege. As a consequence, he might be constrained to give advice without the benefit of full and candid responses to such inquiries. Such a procedure obviously is undesirable: it is not in the interest either of the corporation or of society at large for

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is sought. He may, in effect, be required to give two layers of advice, one as to whether the ensuing communications will be privileged and another on the merits of the legal problem at hand. This can and almost certainly often will occur in situations requiring immediate legal advice on the merits.

[5] In contrast, the "subject matter" test adopted in *Harper & Row* "creates a measure of predictability on which attorneys and corporations can rely." Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 Mich. L. Rev. at 370.

the corporation to be forced to play blindman's bluff with the law.

Furthermore, under the "control group" test the consequences for the lawyer who aggressively presses his inquiries into the facts can be embarrassing in the extreme. His reward for diligence, for example, may be that he later is required to deliver to opposing parties damaging information that causes his client to lose the action he was hired to win. The lawyer may even be called to testify against his client. A practice of that sort would be sadly "demoralizing to the Bar. . . ." *Hickman* v. *Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

There also is an element of unfairness to middle management and operating personnel in the "control group" test. An attorney's investigation may result in communications by employees that reveal possible civil or criminal violations that they may have committed in the course of their employment, and for which they may be individually liable. *See, e.g., United States* v. *Wise*, 370 U.S. 405 (1962). Under the "control group" test, the corporation or its counsel could be compelled to disclose all communications of that nature made by officers and employees other than senior executives; only communications made by members of the control group would be insulated from such compelled disclosure. Thus the "control group" test unfairly puts different employees on a different legal footing with respect to the confidentiality of their admissions to corporate counsel. Moreover, the knowledge that the government could compel the corporation or its counsel to disclose their potentially incriminating communications almost certainly would dissuade lower-level employees who have information of questionable activities from revealing such information to counsel. As a consequence, the "control group" test could directly frustrate the corporation's efforts to discover the facts and acquire the information that it needs in order to put an end to any unlawful activities and place itself in full compliance with the law.

The court of appeals below apparently believed that the restrictive "control group" test was a necessary means of facilitating discovery by opposing parties. But the denial of

confidentiality to communications between counsel and lower-level officers and employees cannot be justified on that ground. Retention of the attorney-client privilege for such communications does not foreclose opposing parties from pursuing all conventional avenues of discovery made available under the federal rules, including questioning the same corporate personnel. *See, e.g.*, Note, *The Attorney and His Client's Privileges*, 74 Yale L.J. 539, 546-47 (1965). The attorney-client privilege appropriately fosters and protects the relationship between lawyer and client, but it does not bar discovery of the facts.

In summary, the question presented by petitioners concerning the proper scope of the attorney-client privilege is vitally important in terms of the legal profession and its responsibilities, and this question was wrongly decided by the court below. Review by this Court plainly is warranted.

2. *An attorney's work product should be accorded a qualified privilege against administrative discovery.* The court of appeals below held, without analysis or elaboration, that the work product doctrine does not apply to an administrative summons issued by the Internal Revenue Service. This holding, which has obvious implications for other forms of administrative discovery as well, squarely conflicts with the conclusion of the Seventh Circuit that "the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons." *United States* v. *Brown*, 478 F.2d 1038, 1041 (7th Cir. 1973). The resulting split of authority creates different rules for litigants in different jurisdictions and raises grave doubts about whether an attorney's work product on behalf of a corporation with geographically widespread activities can ever remain confidential.

There is no apparent basis or justification for the rejection of the work product doctrine in this case. This Court has expressly stated that evidentiary privileges may be asserted against a summons issued by the Internal Revenue Service. *Reisman* v. *Caplan*, 375 U.S. 440, 449 (1964). And it is well established that the applicability of the qualified privilege against disclosure of an attorney's work product is not limited, as the court below

apparently believed, solely to actions governed by the Federal Rules of Civil Procedure: the work product doctrine applies, for example, in both criminal cases and grand jury proceedings. *See, e.g., United States* v. *Nobles,* 422 U.S. 225, 238 (1975); *In re Grand Jury Subpoena,* 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Proceedings,* 473 F.2d 840, 842 (8th Cir. 1973).

The logic of the doctrine extends to administrative proceedings as well. This Court described the basis for the work product doctrine in *Hickman* v. *Taylor*:

> *Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.*
>
> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the

> legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 510-11 (emphasis added). These considerations and concerns are present whether the discovery sought is civil or administrative.

Assertion of the work product privilege in administrative proceedings would not foreclose or significantly curtail the government's ability to conduct a searching inquiry into the pertinent facts. The Internal Revenue Service, for example, has ample authority to secure information from the corporation, its employees, and others who may be in possession of records of transactions or actual knowledge of the facts. Moreover, the work product doctrine itself establishes only a qualified privilege that may be overcome by a showing of necessity. *See, e.g., Hickman* v. *Taylor,* 329 U.S. at 511-12; Fed. R. Civ. P. 26(b)(3). Thus, the government's legitimate interest in knowing the facts and reviewing the evidence can be given appropriate recognition within the traditional confines of the work product doctrine. See *United States* v. *Brown,* 478 F.2d at 1041. That interest does not require or justify wholesale rejection of the work product doctrine in administrative proceedings.

The novel decision below with respect to the work product doctrine serves to compound the harshness of the "control group" test that the court used to limit the attorney-client privilege. The two holdings together appear to permit the government to invade, without any showing of necessity, practically all records maintained by counsel concerning his confidential investigations into allegations of corporate wrongdoing. The consequence of thus turning corporate counsel into an interrogator for the government would be substantially to discourage the socially beneficial practice of corporate self-inquiry. Accordingly, this Court should grant certiorari in order to review both issues of privilege in this case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In The

# Supreme Court of the United States

October Term, 1979

No. 79-886

THE UPJOHN COMPANY and
GERARD THOMAS,

*Petitioners,*

v.

UNITED STATES OF AMERICA
and DAVID E. NOWAK, Special Agent,
Internal Revenue Service,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## Brief Amici Curiae on Behalf of the American College of Trial Lawyers and 33 Law Firms In Support of the Petition

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Internal Revenue Service,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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## Brief Amici Curiae on Behalf of the American College of Trial Lawyers and 33 Law Firms In Support of the Petition

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This brief is filed with the consent of all parties, and in support of the petition for certiorari, on behalf of the American College of Trial Lawyers and the law firms whose names are subscribed at the end of the brief.

## QUESTIONS PRESENTED

1. Whether the attorney-client privilege should be limited so as to protect the confidentiality of communications between an attorney representing a corporation and employees of the corporation only when such employees are among that group within the corporation who are responsible for deciding and directing corporate action in response to the legal advice sought.

2. Whether the work-product doctrine, developed in *Hickman v. Taylor*, 329 U.S. 495, and its progeny, provides a qualified immunity against disclosure of materials sought by a summons issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602.

## INTERESTS OF THE AMICI CURIAE

The American College of Trial Lawyers is an organization of more than 3,000 lawyers and judges throughout the United States dedicated to the improvement and enhancement of the standards of trial practice, the administration of justice and the ethics of the trial branch of the legal profession. The 33 law firms whose names are subscribed to this brief are regularly engaged in the representation of corporations and appear as amici curiae with the College because the issues presented by this case fundamentally affect responsibilities they have to their clients, the administration of justice and the legal profession.

Petitioners and respondents here must necessarily focus on the particular facts of this case and the respective interests of the parties to this litigation. The problems raised by the decision of the court below, however, are much broader in nature than the circumstances giving rise to this particular case, for they put in issue the very nature of the attorney-client privilege in the corporate area and

the applicability of the work-product doctrine to investigative proceedings involving individuals as well as corporations. This brief will focus on the urgent need for the enunciation by this Court of a clear and workable definition of the corporate attorney-client privilege, accurately reflecting the way modern corporations function, and of standards for application of the work-product doctrine which are consistent with the responsibilities and role of counsel in an adversary system of justice.

## STATEMENT

The facts and proceedings below are fully set forth in the petition, which seeks review of a decision of the United States Court of Appeals for the Sixth Circuit holding that the attorney-client privilege protects the confidentiality of communications between an attorney representing a corporation and employees of the corporation only when such employees constitute the "senior management" or "control group" of the corporation, and further that the work-product doctrine, developed by this Court in *Hickman v. Taylor,* 329 U.S. 495, provides no immunity against the disclosure of information sought by an administrative summons issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602.

The opinion of the court below is reported at 600 F.2d 1223, and at p. 1-a of the Appendix to the petition. (Pet. App., 1-a).

## REASONS FOR GRANTING THE WRIT

### A. The Decision of the Court Below, Which is in Conflict with Decisions of Other Courts of Appeals, Presents Issues of Vital Importance to Corporations and Their Counsel Which Require Consideration and Decision by This Court.

Corporations have played a central and pervasive role in the economy of the United States for more than a century, and as the corporate form of organization has continued to expand in scale, number and significance, so has the involvement of the government in corporate activities. Compliance with constantly changing tax, securities and antitrust laws, as well as many other federal and state regulations, presents numerous legal questions, often of great complexity, which require the active participation of counsel in the affairs of the modern corporation. The decision of the court below, departing as it does from the policies underlying protection of the attorney-client relationship, raises serious and fundamental questions concerning the extent to which the professional advisory function of lawyers can be performed in the corporate area.

The test adopted by the court below for application of the attorney-client privilege to corporations will reduce the effectiveness of the professional advice corporations will receive and substantially impede voluntary compliance by corporations with laws dependent to a very great extent for their enforcement on responsible corporate reaction to competent legal advice. The confusion which now exists among the circuits concerning the scope of the corporate attorney-client privilege and the availability of the work-product doctrine in investigative proceedings compounds the problem, for corporations today are not confined in their activities to any particular circuit or jurisdiction, and counsel cannot properly advise any busi-

ness conducted on a national scale when the rules which govern their conduct read one way in New York, Philadelphia, and Detroit, and another way in Chicago and St. Louis.

Seldom is this Court presented with such an appropriate vehicle as this case for review of two important and related issues which many lower court decisions demonstrate are recurring in nature and on which there is a direct conflict among the circuits. As this Court recognized when it granted certiorari in *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided Court,* 400 U.S. 348, such conflict and uncertainty with respect to issues so central to the administration of justice warrant the attention of this Court.

**1. The Decision of the Sixth Circuit and a Recent Decision of the Third Circuit Limiting the Scope of the Corporate Attorney-Client Privilege to the "Control Group" of the Corporation are in Direct Conflict with Decisions of the Courts of Appeals for the Seventh and Eighth Circuits.**

Although it has been established for several years that the attorney-client privilege applies to corporate as well as individual communications with counsel,[1] there are now diverse and conflicting views among the federal courts on

[1]See, *e.g., Radiant Burners, Inc. v. American Gas Ass'n.,* 320 F.2d 312 (7th Cir. 1963), *cert. denied,* 375 U.S. 929; *Paper Converting Machine Co. v. FMC Corp.,* 215 F.Supp. 249, 251 (E.D. Wis. 1963);*United States v. Becton Dickinson & Co.,* 212 F.Supp. 92, 93 (D. N.J. 1962); *United States v. Aluminum Company of America,* 193 F.Supp. 251, 253 (N.D. N.Y. 1960); *United States v. American Radiator & Standard Sanitary Corp.,* 1958 CCH Trade Cas. ¶ 68,954 (W.D. Pa. 1958); *Zenith Radio Corp. v. RCA,* 121 F.Supp. 792 (D. Del. 1954); *United States v. United Shoe Machinery Corp.,* 89 F.Supp. 357 (D. Mass. 1950); *Danisch v. Guardian Life Ins. Co.,* 18 F.R.D. 77 (S.D. N.Y. 1955); *Lalance Mfg. Co. v. Haberman Mfg. Co.,* 87 F. 563 (C.C.S.D. N.Y. 1898).

the scope of the corporate privilege. The test adopted by the court below for application of the privilege to corporations was first enunciated in *City of Philadelphia v. Westinghouse,* 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied, sub nom., General Electric Co. v. Kirkpatrick,* 312 F.2d 742 (3d Cir. 1962), *cert. denied,* 372 U.S. 943, where the privilege was limited to protect only communications between counsel and members of the so-called "control group" of the corporation. Subsequently, the control group test was applied by the Tenth Circuit in *Hogan v. Zletz,* 43 F.R.D. 308 (N.D. Okla. 1967), *aff'd sub nom. Natta v. Hogan,* 392 F.2d 686 (10th Cir. 1968).[2]

In *Harper & Row Publishers, Inc. v. Decker, supra,* the Court of Appeals for the Seventh Circuit concluded that the control group test was undesirably restrictive and adopted a broader and more balanced test, characterized as the "subject matter" test, to determine the scope of the corporate attorney-client privilege. This Court recognized the significance of the conflict then existing among the circuits on the scope of the privilege, and attempted to resolve it by granting certiorari in *Harper & Row;* however, the *Harper & Row* decision was affirmed without opinion by an equally divided Court. 400 U.S. 348.

The important distinction between the two conflicting tests for application of the privilege is the extent to which communications between the corporate attorney and lower level corporate employees are protected by the attorney-client privilege. The control group test limits the privilege to communications between corporate counsel and a limited group of corporate executives who have ultimate corporate responsibility for acting upon the advice of counsel. *City of Philadelphia v. Westinghouse, supra,* 210 F.Supp.

[2] It remains unclear whether the Tenth Circuit has in fact adopted the control group test. In *Natta v. Hogan, supra,* the test was applied without any discussion, 392 F.2d 692. The opinion of the District Court indicates that application of the control group test was uncontested. 43 F.R.D. 312-14.

at 485. The subject matter test, on the other hand, provides protection to communications between the corporate attorney and corporate employees under circumstances where the communication is made at the direction of the employee's superior and where the subject matter of the attorney's advice, and that of the communication, is the performance by the employee of the duties of his employment. See 2 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 503(b) [04] at 503-46 to 503-48 (1979).

Recently the question of the scope of the corporate attorney-client privilege has been the subject of further consideration and decision, which has resulted in an intensification of the conflict in the courts of appeals. In *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978), the Eighth Circuit made application of the subject matter test. The Third Circuit has reaffirmed its preference for the control group test, *In re Grand Jury Investigation (Sun Company, Inc.)*, 599 F.2d 1224 (3d Cir. 1979), and the Sixth Circuit has now decided to "align ourselves with the courts that have adopted the 'control group' analysis." 600 F.2d at 1227. Thus, the circuits which have considered and decided the issue are now equally divided, with most of the decisions having come down since *Harper & Row*. The need for this Court to resolve this conflict is greater today than it was when certiorari was granted in *Harper & Row*.[3]

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[3] Review by this Court is required not only to resolve the conflict among the decisions of the courts of appeals, but also to provide an authoritative delineation of the scope of the corporte attorney-client privilege in order to avoid the continuing confusion on this important question throughout the federal judicial system. See *In re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979); *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D.D.C. 1978); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 459, (N.D. Cal. 1978); *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136 (D. Del. 1977); *Duplan Corp v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1165 (D.S.C. 1974); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 35-39 (D. Md. 1974).

**2. The Decision of the Court Below That the Qualified Work Product Immunity is Inapplicable to an Internal Revenue Service Summons is in Conflict with a Decision of the Court of Appeals for the Seventh Circuit.**

This is one of the rare cases presenting two related issues on which the courts of appeals are divided. The second question presented here is whether the qualified work-product immunity, first articulated in *Hickman v. Taylor*, 329 U.S. 495, may be invoked to prevent disclosure of information sought by an Internal Revenue Service summons issued pursuant to 26 U.S.C. § 7602, an issue previously considered by the Fifth Circuit in *United States v. McKay*, 372 F.2d 174 (5th Cir. 1967), and by the Seventh Circuit in *United States v. Brown*, 478 F.2d 1038 (7th Cir. 1973).

In *Brown*, the Seventh Circuit held that the work-product doctrine was applicable to a summons enforcement proceeding. The Fifth Circuit was not required to decide the issue in *McKay*, but stated that it was "doubtful" that the doctrine was applicable in that context.[4] Notwithstanding this division of opinion on the issue, the court below in this case disposed of the issue in a footnote, holding, contrary to the Seventh Circuit in *Brown*, that "the work-product doctrine of *Hickman v. Taylor* and Fed. R. Civ. P. 26(b)(3) is not applicable to administrative summonses issued under 26 U.S.C. § 7602."

In *Reisman v. Caplan*, 375 U.S. 440, 449, this Court recognized the right of a party to challenge an Internal Revenue Service summons "on any appropriate ground," and Mr. Justice White, in his concurring opinion in *United States v. Nobles*, 422 U.S. 225, 247 n.6, noted the diver-

[4]The United States District Court for the Northern District of Texas has recently construed *McKay* to permit application of the work-product doctrine to an IRS summons. *United States v. Lipshy*, ... F.Supp. ..., 79-2 U.S.T.C. ¶ 9628 (N.D. Tex. Sept. 25, 1979).

gence among the courts of appeals on whether the work-product immunity should apply to material requested by such a summons. As in the case of the attorney-client privilege, this confusion on the applicability of the work-product doctrine to an administrative summons has now developed into a direct conflict between the Sixth and Seventh Circuits which can only be resolved by this Court.

### B. The Decision of the Court Below is Inconsistent with Principles Established and Applied by Several Decisions of This and Other Federal Courts Concerning the Attorney-Client Privilege and the Work-Product Doctrine.

#### 1. The Attorney-Client Privilege

Since the purpose of the attorney-client privilege is to enable the client to obtain legal advice based on the fullest possible understanding of the facts, *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336; *Hunt v. Blackburn*, 128 U.S. 464, 470, the scope of the privilege must be such that it will "encourage clients to make full disclosure to their attorneys." *Fisher v. United States*, 425 U.S. 391, 403. The test adopted by the court below for application of the attorney-client privilege to corporations is inconsistent with the basic policies recognized by this Court as underlying the privilege and fails to take account of the ways in which modern corporations are organized and operate, and how they seek, assimilate and act upon legal advice.

The Sixth Circuit's opinion is based upon the fundamental misconception that there is a definable "control group" in every corporation which is responsible for corporate action based upon legal advice. Indeed, "it is only the senior management," the court below said, "which can be said to possess an identity analogous to the corporation as a whole." 600 F.2d 1226. This view of the way corpo-

rations function gives undue emphasis to the legal fiction of the corporate entity and is contrary to the teaching and experience of authoritative corporate analysts, who view corporate decision-making as a process rather than an event.[5] As a practical matter, principal corporate executives are ordinarily not involved in the day-to-day operations of the corporation which may be the subject of legal inquiry and advice.[6] Corporations today are more often characterized by decentralized decision making, where responsibility for corporate action may be delegated not only to divisions and departments, but also to lower level employees, such as contract administrators, and purchasing and sales personnel, who act for and bind the corporation in its relations with other parties.[7] Even when the ultimate

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[5] "Decisions often appear to be unique and isolated events. However, a decision reflects antecedent behavior as well as anticipated consequences. Therefore, it is necessary to understand decision making as a process. Focusing only on the moment of choice among alternatives . . . leads to a false concept of decisions and 'ignores the whole lengthy, complex process of alerting, exploring and analyzing that precedes the final moment'." D. E. McFarland, *Management: Principles and Practices,* McMillan Pub. Co. (1974) at 262, quoting H. A. Simon, *The New Science of Management Decision,* Harper & Row (1960) at 1.

[6] See, *e.g., Modern Management, Issues and Ideas,* D. R. Hampton (ed.), Dickenson Pub. Co. (1975); E. Uyterhoeven, *General Managers In The Middle,* 50 Harv. Bus. Rev. 75 (1972); *Top Management Handbook,* H. B. Maynard, (ed), McGraw-Hill (1960); V. Vroom, *A New Look At Managerial Decision Making,* Organizational Dynamics-AMACOM (Spring 1973).

[7] See *e.g.,* H. Stieglitz and A. Janger, *Top Management Organization in Divisionalized Companies,* Conference Board, Studies in Personnel Policy No. 195 (1965). The control group test produces the incongruous result that subordinate corporate employees for whose conduct a corporation is liable, and whose knowledge is imputed to it, cannot speak confidentially to the corporation's attorneys about the acts which they perform on the corporation's behalf.

decision is made by a corporate executive, preliminary legal consultation and analysis is frequently and necessarily delegated to subordinate personnel.

If the objectives of the attorney-client privilege are to be accomplished in the corporate area, counsel must be able, as the subject matter test permits, to elicit information from and to advise those corporate employees most directly involved in the area or problem giving rise to the need for investigation and advice. Counsel should not be confronted with the dilemma inherent in the control group test of either advising the client without knowledge of all relevant facts, or of obtaining the necessary information from the client's agents and employees at the risk of having to divulge it to an adverse party. The Eighth Circuit identified this critical deficiency in the control group test in its decision in *Diversified Industries, Inc. v. Meredith, supra,* 572 F.2d at 608-09:

> In a corporation, it may be necessary to glean information relevant to a legal problem from middle management and non-management personnel as well as from top executives. The attorney dealing with a complex legal problem "is thus faced with a 'Hobson's choice.' If he interviews employees not having 'the very highest authority,' their communications to him will not be privileged. If, on the other hand, he interviews *only* those with 'the very highest authority,' he may find it extremely difficult, if not impossible, to determine what happened." [citation] Thus, the control group test inhibits the free flow of information to a legal advisor and defeats the purpose of the attorney-client privilege.

Since first-hand knowledge of relevant facts is usually possessed by corporate agents and employees who do not have the ultimate responsibility of officers or directors of the corporation, the practical effect of the control group test is substantially to deprive corporations of the protection of the attorney-client privilege. It will also inhibit

the efforts of corporate counsel to seek out and develop information concerning existing and past activities of corporations in order to insure compliance at all levels of the corporate structure with the myriad of laws and regulations which govern corporate conduct today. This important relationship between the scope of the privilege and compliance by corporations with laws dependent for their enforcement on the responsibility and advice of corporate counsel was described in *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1165-65 (D.S.C. 1974), as follows:

> [T]he only way that a lawyer can really understand how a corporation operates, what it is doing, and what it can do within the confines of the antitrust laws, is to go out into the branch offices and into the field to make the rounds with the salesmen. After the lawyer forms his or her opinion, it is of no immediate benefit to the chairman of the board or the president. It must be given to the corporate personnel who will apply it. If an attorney cannot make enquiries of salesmen and if the attorney cannot give advice to the corporate personnel who will apply it, then a corporation would be reluctant to seek legal advice since its confidential communications would not be protected by the attorney-client privilege. This court recognizes that it is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients.

The suggestion in the opinion below that the control group test is necessary to avoid the possibility of counsel being the "exclusive repository of unpleasant facts" and corporate managers "shielding themselves from information about possibly illegal transactions," 600 F.2d at 1227, is unwarranted and ignores the reality that the subject matter test protects only communications with counsel and does not prevent discovery of the underlying facts known by corporate agents and employees. *Grant v. United States*,

227 U.S. 74, 79; *Giordani v. Hoffman,* 278 F.Supp. 886, 888-90 (E.D. Pa. 1968). Hence, there is little possibility of obstruction from the activities of counsel advising a corporate client under the subject matter test, which imposes several preconditions to any claim of privilege. See *Diversified Industries, Inc. v. Meredith, supra* at 609.

Finally, the rationale of the privilege, that it induces disclosures "which might not have been made absent the privilege," *Fisher v. United States, supra,* 425 U.S. at 403, presumes knowledge at the time the communication is made that it will be accorded protection. Under the control group test, however, neither counsel nor the client will be able to ascertain with certainty at the time a communication is made whether it can be protected. Indeed, the test is so uncertain as to make prospective determination of its application impossible and, therefore, only serves to undermine the policies this and other federal courts have recognized as the basis for the attorney-client privilege.

### 2. The Work-Product Doctrine

This Court's opinion in *Hickman v. Taylor, supra,* the first clear articulation of the work-product doctrine, was a natural refinement of the newly established discovery procedures, a development "grounded in the realities of litigation in our adversary system." *United States v. Nobles,* 422 U.S. 225, 238. The real question underlying the second issue presented by this case is whether, because an administrative summons is involved, there is no necessity for adherence to policies deemed by this Court to be essential to "the orderly prosecution and defense of legal claims." *Hickman v. Taylor, supra,* 329 U.S. at 510.

Applicability of the work-product doctrine to an administrative summons, such as that issued here by the Internal Revenue Service pursuant to 26 U.S.C. § 7602, presents many of the same issues considered by the lower federal courts in determining the availability of the doc-

trine in grand jury investigations. Some early doubt concerning the propriety of applying the doctrine at the investigative stage of criminal proceedings, *Schwimmer v. United States,* 232 F.2d 855 (8th Cir. 1956), *cert denied,* 352 U.S. 833, was resolved in favor of its applicability through resort to the basic policy underlying the doctrine. See *In re Grand Jury Proceedings (Duffy),* 473 F.2d 840, 847 (8th Cir. 1973):

> While it is true that the cases [cited] above involved criminal trials rather than Grand Jury proceedings, we see no reason to distinguish them on that basis. Surely the search for truth is no less compelling at a criminal trial than at a Grand Jury proceeding. The interest in protecting work product which prevails in the former criminal proceeding should, for the same policy reasons, prevail in the latter.

As the government acknowledged in its brief below, an IRS summons is analogous to a grand jury investigation, and there is now almost universal acceptance by the lower federal courts of the applicability of the work-product doctrine to grand jury investigations. *In re Grand Jury Investigation (Sun Company, Inc.), supra; In re Grand Jury Subpoena, supra; Velsicol Chemical Corp. v. Parsons,* 561 F.2d 671 (7th Cir. 1977), *cert. denied,* 435 U.S. 942; *In re Grand Jury Proceedings (Duffy), supra; In re Grand Jury Investigation (Sturgis),* 412 F.Supp. 943 (E.D. Pa. 1976); *Matter of Rosenbaum,* 401 F.Supp. 807 (S.D. N.Y. 1975); *United States v. Mitchell,* 372 F.Supp. 1239 (S.D. N.Y.), *app. dismissed,* 485 F.2d 1290 (2d Cir. 1973); *In re Terkeltoub,* 256 F.Supp. 683 (S.D. N.Y. 1966).

A summons issued by a Special Agent of the IRS Criminal Investigation Division could lead to further civil or even criminal proceedings. See *United States v. LaSalle Nat'l Bank,* 437 U.S. 298. There is, therefore, no basis for drawing a distinction between an administrative and grand jury investigation. Nor is there any sound reason why the IRS should not be required to utilize traditional means

available for obtaining discovery rather than compelling attorneys for individual and corporate taxpayers to testify concerning communications with their clients, or to open their files for examination by the IRS. As this Court said in *Hickman v. Taylor, supra,* 329 at 510-11:

> In performing his various duties * * * it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

In *United States v. Nobles, supra,* 422 U.S. at 238, this Court saw no reason to limit application of the work-product doctrine to civil proceedings, saying "its role in assuring the proper functioning of the criminal justice system is even more vital." Review of the decision below is necessary because an administrative summons, issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602, must be governed by the same policies if the right to the meaningful assistance of counsel is to be preserved in administrative investigations as well as judicial proceedings.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1979

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-886**

**THE UPJOHN COMPANY**, et al.,

*Petitioners*

v.

**THE UNITED STATES OF AMERICA**, et al.,

*Respondents*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## MEMORANDUM OF THE CHICAGO BAR ASSOCIATION AS AMICUS CURIAE

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IN THE

# Supreme Court of the United States

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v.

**THE UNITED STATES OF AMERICA**, et al.,

*Respondents*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## MEMORANDUM OF THE CHICAGO BAR ASSOCIATION AS AMICUS CURIAE

This memorandum of the Chicago Bar Association is filed with the consent of all parties and in support of the petition for a writ of certiorari on the issue of the attorney-client privilege.

## INTERESTS OF THE AMICUS CURIAE

The Chicago Bar Association is an association of more than 14,000 lawyers and judges who practice in the metropolitan Chicago, Illinois area. The diversity of their practices and the range of their interests in areas of concern to the profession is limited only by the parameters of modern business practice. Many of the Association's members are actively engaged in counseling and otherwise representing corporations and their employees with business

activity both within and without the State of Illinois and its contiguous neighbors. The existing uncertainty with respect to the scope of the attorney-client privilege has a substantial disruptive influence on a lawyer's ability to discharge his professional responsibility in representing and advising corporations.

## STATEMENT

The facts and proceedings below are fully set forth in the petition.

## QUESTION PRESENTED

Whether communications between an employee of a corporation and an attorney for the corporation, relating to the subject matter of the employee's duties and involving legal services being performed for the corporation by the attorney, both of whom treat the communication as necessary and confidential, are protected from unauthorized disclosure by the attorney-client privilege.

## ARGUMENT

This case presents an opportunity for the Court to resolve a clear conflict between the circuits on a question of substantial practical application. The Sixth Circuit has now adopted the "control group" test for determining the extent of the attorney-client privilege, thus joining the Third Circuit (*In Re Grand Jury Investigation,* 599 F.2d 1224 (3rd Cir. 1979)) and perhaps the Tenth Circuit (see *Natta* v. *Hogna,* 392 F.2d 686 (10th Cir. 1968)). The "subject matter" test, on the other hand, is the law in the Seventh Circuit (*Harper & Row Publishing, Inc.* v. *Decker,* 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court,* 400 U.S. 348 (1971), *reh. denied,* 401 U.S. 950 (1971); *Sylgab Steel & Wire Corp.* v. *Moco-Gateway Corp.,* 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd,* 534 F.2d 330 (7th Cir., 1976)) and in the Eighth Circuit (*Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir., 1977) (*en banc*)).

Of the remaining six circuits, the weight of authority in the Fourth, Ninth, and District of Columbia Circuits supports use of the "subject matter" test. *Burlington Industries, Inc.* v. *Exxon Corp.,* 65 F.R.D. 26 (D.Md. 1974);*

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* This case is sometimes erroneously cited as a "control group" decision. *E.G.,* Note, *Corporate Attorney-Client Privilege—Diversified Industries, Inc.* v. *Meredith—The Modified Harper & Row Test,* 4 J.Corp.L. 226 (1978). It clearly is not, for the court expressly held that the privilege extended to intracorporate documents "which are prepared at the direction of members of the control group to aid counsel in rendering legal assistance to the corporation, at the express or implied request of counsel, and which are primarily legal in nature" (65 F.R.D. at 39), that the request to the attorney for legal advice could also be "implied" (65 F.R.D. at 37), and that the "direction" from a control group member to a lower-level corporate employee could likewise be implicit. (65 F.R.D. at 38.)

*Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F.Supp. 1146 (D.S.C. 1974), *Perrignon* v. *Bergen Brunswig Corp.*, 77 F.R.D. 455 (N.D.Cal. 1978); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D.D.C. 1978).* The Second Circuit recently declined to resolve the conflict in *In re Grand Jury Subpoena (General Counsel, John Doe, Inc.)*, 599 F.2d 504, 511 (2nd Cir., 1979). There are no recent cases from the First Circuit, but the leading case of *United States* v. *United Shoe Machinery Corp.*, 89 F.Supp. 357 (D.Mass. 1950), held that communications from all corporate agents are protected. A number of federal administrative decisions have likewise adopted the "subject matter" test.** The importance of predictability in matters relating to the attorney-client privilege supports the granting of certiorari to resolve the current conflict—regardless of the result.

In addition, it is the position of the Chicago Bar Association that the issue should be resolved by adoption of the subject matter test. The purpose of the attorney-client privilege is to encourage by confidentiality full and truthful communication of the facts by the client to his attorney and candid advice by the attorney to the client. Where the client is a corporation, these purposes cannot be served by limiting the attorney-client privilege to communications between counsel and members of the "control group." Generally, it is operating employees outside of the control group who have knowledge of the facts which the attorney needs to learn. Similarly, the attorney's legal advice and instructions, to be effective, must be communicated to the corporate employees on the "firing line".

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* A contrary case from the Fourth Circuit is *Virginia Electric & Power Co.* v. *Sun Shipbuilding & D.D. Co.*, 68 F.R.D. 397 (E.D.Va. 1975). Cf. *Garrison* v. *General Motors Corp.*, 213 F.Supp. 515 (S.D.Cal. 1963).

** *Safeway Stores, Inc.*, FTC Dkt. 9053 (ALJ proc. order, June 30, 1976); *American Dental Ass'n*, FTC Dkt. 9093 (ALJ proc. order, Sept. 27, 1977); *General Motors Corp.*, FTC Dkt. 9074 (ALJ proc. order, Jan. 25, 1978).

The control group test, therefore, is an artificial restriction which cannot be justified by reason of the nature and rationale of the attorney-client privilege. Indeed, this test directly conflicts with the entire basis of the attorney-client relationship by making the attorney's fact gathering from corporate employees and his advice to corporate employees potentially available to adverse parties for use against his client.

The practical implications of the "control group" test in a business environment populated by corporations and increasingly exposed to litigation are far reaching. The most obvious and predictable result of an application of the "control group" test may well be attorneys for corporations parading to the witness stand to testify about what they learned from corporate employees in the course of their representation of the corporation.*

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* Attempts to obtain attorney's testimony or records are increasing rapidly in number, particularly in Government investigations. In addition to *Upjohn*, see, e.g., *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979); *In re Grand Jury Proceedings (McCoy)*, 601 F.2d 152 (5th Cir. 1979); *In re Grand Jury Proceedings (Lawson)*, 600 F.2d 215 (9th Cir. 1979); *In re Grand Jury Investigation (United States)*, 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Subpoena (General Counsel, John Doe, Inc.)*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1973); *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F.Supp. 368 (E.D.Wisc. 1979); *Matter of Grand Jury Subpoena*, 438 F.Supp. 1176 (S.D.N.Y. 1977); *In re Grand Jury Investigation (Sturgis)*, 412 F.Supp. 943 (E.D.Pa. 1976); *Matter of Grand Jury Subpoenas Served Upon Field*, 408 F.Supp. 1169 (S.D.N.Y. 1976); *In re Grand Jury Subpoena, Nov. 16, 1974*, 406 F.Supp. 381 (S.D.N.Y. 1975); *In re Rosenbaum*, 401 F.Supp. 807 (S.D.N.Y. 1975); *In re Stolar*, 397 F.Supp. 520 (S.D.N.Y. 1975).

The routine use of attorneys as witnesses against their clients is of course unseemly and directly contrary to the whole concept of the attorney-client relationship. The situation can only result in less effective legal representation for the corporation.

This result cannot be justified on the ground that it is the only feasible method for litigants to extract necessary information from corporate adversaries. The federal rules require the production of all relevant documents relating to the subject matter of the litigation. All corporate employees may be required to testify concerning their knowledge of the facts. Interrogatories pursuant to Rule 33, Federal Rules Civil Procedure, require the corporation to assemble and provide all information in the possession of its employees. Under Rule 30(b)(6), FRCP, a corporation may be required to designate a witness or witnesses who must testify to matters "known or reasonably available" to the corporation. There has been no showing that these discovery procedures are inadequate. Certainly there is no showing that the discovery process cannot function without making the attorney a witness against his client.

In a lawsuit the attorney has an obligation to determine the facts. He must therefore go where the facts are found. An antitrust case involving allegations of price fixing can not be defended without the defendant's attorney interviewing the sales personnel, nor prosecuted without the plaintiff's attorney interviewing the purchasing agents. Similarly, a product design defect case can not be defended without the attorney interviewing the design engineers, nor prosecuted without interviewing the corporate employees who either bought, serviced or operated the allegedly defective equipment. Rarely will such individuals be members of the control group.

In a "control group" jurisdiction an attorney representing a corporation can have little confidence that his efforts in assembling information from his client may not ultimately be used to his client's detriment. Certainly the attorney must have reservations about assuring his client the communications will be kept confidential. In turn the corporate employees must have reservations about what to tell the corporation's lawyer. The effect may well be longer, more expensive, less efficient litigation since the lawyers representing the corporation may be forced to temper their factual research from fear of being turned into third parties for discovery purposes.

Compliance programs and similar internal examinations cannot be conducted with confidence in their confidentiality in a "control group" jurisdiction and therefore may well be less frequently or thoroughly done. Discouraging self-policing efforts is not of benefit to the public since the practice is generally considered beneficial, and perhaps is an essential adjunct to official enforcement of laws governing corporate conduct. The increasing frequency of such programs is indicated by the numerous reported decisions involving such internal corporate investigations.* However, since the alleged violations are generally neither committed by nor known to members of the "control group," adoption of the "subject matter" test for application of the privilege is essential to the continued viability of the practice. Otherwise, as in *Upjohn,* counsel conducting such inquiries will likely become witnesses against their clients.

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* *SEC* v. *Dresser Industries, Inc.,* CCH Fed.Sec.L.Rptr. ¶ 97,172 (D.C.Cir. 1979); *United States* v. *Upjohn Co., supra; Diversified Industries* v. *Meredith, supra; In re Grand Jury Investigation (United States), supra; In re Grand Jury Subpoena (General Counsel, John Doe, Inc.), supra; In re Grand Jury Subpoena Dated July 13, 1979, supra.*

The net effect of an erosion of confidence by the corporation in the privileged nature of communications with its lawyers will be to reduce significantly the ability of the corporation to obtain the effective assistance of counsel. A corporation should not be forced to use lawyers who are unable to prepare properly. A lawyer should not be forced to represent a corporation with his head in the sand. A corporate client must trust its lawyers to learn the facts necessary to properly advise it and the lawyer must be able to give advice based on as complete knowledge as possible.

Corporate clients need full and frank legal advice as much as natural persons. Judge Medina pointed out in *A.B. Dick Co.* v. *Marr,* 95 F.Supp. 83, 102 (S.D.N.Y. 1950), *appeal dsm'd,* 197 F.2d 498 (2d Cir. 1951), *cert. denied,* 344 U.S. 878 (1952):

> "Since [the] early statements [of the purposes of the privilege], the necessity of protecting the attorney-client relationship has become even more apparent; the legal rights and duties of large corporations and those who dispute with them would not be susceptible of judicial administration in the absence of lawyers, nor, in the absence of the privilege could lawyers properly represent their clients."

The rejection of the "control group" test and the adoption of the "subject matter" test will best effectuate these principles.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 24, 1980

NO. 79-886

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OCTOBER TERM, 1979

THE UPJOHN COMPANY AND GERARD THOMAS, VICE PRESIDENT, SECRETARY AND GENERAL COUNSEL, PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM OF THE COMMITTEE ON CORPORATE LAW DEPARTMENTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE


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# In the Supreme Court of the United States

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THE UPJOHN COMPANY AND GERARD THOMAS,
VICE PRESIDENT, SECRETARY AND GENERAL COUNSEL,
PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## MEMORANDUM OF THE COMMITTEE ON CORPORATE LAW DEPARTMENTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE

---

The Committee on Corporate Law Departments of the Association of the Bar of the City of New York files this memorandum with the consent of counsel for the petitioners and the Government to urge that the Court grant the petition for a writ of certiorari to review the decision of the Court of Appeals for the Sixth Circuit rendered in this case on June 28, 1979.

### STATEMENT

On November 23, 1976 a special agent of the Internal Revenue Service issued a narrowly-drawn summons, under the authority of 26 U.S.C. §7602, to petitioners, Upjohn Company and Gerard Thomas, its Vice President, Secretary and General Counsel. The summons directed them to produce for governmental examination "[all] the files relative to the investigation conducted under the supervision of [the General Counsel]" into foreign political and governmental

payments made by Upjohn or any of its affiliates. (Pet. App. B at 11a.) The summons specifically defined the files to include, without limitation, "written questionnaires sent to managers" of Upjohn's foreign affiliates, and "memorandums or notes of the interviews conducted in the United States and abroad with officers and employees . . . ." (*Id.*) The summons was designed to reach the General Counsel and two outside attorney's documented communications with Upjohn employees made between January and March, 1976 in an internal, confidential legal investigation of foreign payments ordered by the Chairman of the Board. Petitioners refused to produce the requested records on the grounds that they were covered by the attorney-client privilege, or the so-called "work product" doctrine, and that the requisite standards for judicial enforcement of the summons had not been met.[1]

On August 31, 1977, upon petition of the Government, an order to show cause was entered against petitioners directing them to show cause why they should not be compelled to obey the summons. Upon assignment of the matter to a U.S. Magistrate and after hearing, the Magistrate ruled on February 23, 1978, as amended by letter dated March 11, 1978, that the "control group" test was the appropriate legal standard for determining "the circumstances under which a communication of an employee or agent of the corporation may be deemed to be the communication of the corporate client enabling the corporation to claim the attorney-client privilege." (Pet. App. B at 18a *et seq.*). The Magistrate stated the "control group" test as follows:

> [I]f the employee making the communication, of whatever rank he might be, was in a position to control or even to take a substantial part in a decision about any action which the corporation might take upon the resulting advice of the attorney, or if he was an authorized member of a body or group which had that authority, then in effect he was or personified the corporation when making the disclosure, and the privilege would apply, while in all other cases the employee would be merely giving the information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.
> (Pet. App. B at 20a).

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[1] This memorandum *amicus curiae* is addressed solely to the District Court's application of the "control group" test in the determination of the existence of attorney-client privilege and does not discuss any other aspect of that Court's decision or any other issue presented by the parties.

Applying this test to the facts, the Magistrate found that the communications in question were not privileged:

> It is apparent from the record that the matter as to which the interviewees made the disclosures to Mr. Thomas was a matter of overwhelming importance to the Company but not one as to which any of the interviewees would be given any substantial role. When Mr. Thomas first heard of the questionable payments, he went first to the Chairman of the Board to discuss the matter. The questionnaire that was sent to the employees went out over the signature of the Chairman of the Board. Mr. Thomas' concern was with the SEC ramifications, the tax consequences, currency regulations, and the like. (Tr. 79-80). These are matters on the highest corporate level and hardly within the domain or authority of the persons interviewed. Clearly, these persons in completing the questionnaire and submitting to interviews were simply giving information to Mr. Thomas to enable him to advise the Board of Directors and its Chairman as to how to handle the securities, tax, and related problems which the questionable payments created. Only the latter had the authority to act in these areas. Thus the disclosures made by the interviewees to Mr. Thomas or the Company's outside counsel do not fall within the attorney-client privilege. (Pet. App. B at 22a-23a.)

The District Court on April 28, 1978 adopted the Magistrate's Report and Recommendation and further ordered on May 16, 1978 the enforcement of the summons (Pet. App. C and D.)

Upon appeal to the Sixth Circuit, the Court affirmed the use of the "control group" test and adopted it as the appropriate standard for determining the existence of corporate privilege.[2] 600 F.2d 1223 (6th Cir. 1979).

The Sixth Circuit described the two "tests" from which it had to choose as follows:

> The difficulty arises when, after the attorney-client relationship has been established by the top management, communications are made to counsel by subordinate corporate agents and employees. Some courts, notably the Seventh and Eighth Circuits, have adopted the position that such communications are privileged if certain conditions are met. The specification of the conditions varies, but the sum and substance are similar: If the agent is in possession of information acquired in the ordinary course of business relating to the subject matter of his employment, and the information is communicated confidentially to corporate counsel to assist him in giving legal advice to the corporation, then the communication is privileged. Under this "subject-matter" approach, the privilege does not cover communication of pre-existing

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[2] The Court reversed that part of the lower court's decision which found certain communications non-privileged which were made by apparent members of the "control group" and ordered, on remand, the factual determination of that question. 600 F.2d at 1227-8.

documents prepared for independent business reasons or communications unrelated to the subject matter of the agent's employment. Other courts have adopted a narrower approach which covers only those communications made by the so-called "control group" of the corporation, namely, those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given. (600 F.2d at 1226) (footnotes omitted).

The Court rejected the "subject matter" test for two explicit reasons. First, the Court felt that that test "encourages senior managers purposely to ignore important information they have good business reasons to know and use" (600 F.2d at 1227); and second, that test ". . . fosters situations in which the *only* record of the full details of a particular transaction is in the hands of corporate counsel and . . . undiscoverable" (*Id.*) (emphasis in original.)

## INTEREST OF THE AMICUS CURIAE

The Committee on Corporate Law Departments includes among its members the chief legal advisors of a number of major United States corporations. Consequently, the resolution of the scope of attorney-client privilege for corporations is a matter of vital importance to the Committee's membership.

## ARGUMENT

This case presents an important question vital to the proper functioning of the legal profession in its duties to its corporate clients. The determination of who can be appropriately designated as a "representative" of a corporation for attorney-client privilege purposes is one that must be made using a uniform, predictable and national standard. More than that, such a standard is needed which fully and fairly reflects the reality of corporate life and society's need for corporations to receive unobstructed, frank and competent legal advice. Failure to provide such a result will impede the ability of attorneys to effectively counsel corporations and, in consequence, possibly frustrate their corporate clients' desire and obligation to obey the law. The Committee on Corporate Law Departments believes the decision below, with its adoption of the "control group" test, is incorrect and that the decision, by reinforcing the existing conflict between circuits regarding the appropriate test, requires review by this Court.

1. The decisions of the Courts of Appeals for the Seventh and Eighth Circuits in *Harper & Row Publishers, Inc.* v. *Decker*, 423

F.2d 487 (7th Cir. 1970 (per curiam), *aff'd without opinion by an equally divided Court*, 400 U.S. 348 (1971) and *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 606 (8th Cir. 1978) (en banc), are in direct conflict with the decision below and with the decision of the Court of Appeals for the Third Circuit in *In re Grand Jury Investigation*, 599 F.2d 1224 (3rd Cir. 1979).[3]

Corporations and their counsel are thus faced with conflicting tests used to determine the existence of privilege for communications with corporate personnel. Should corporations be litigants in the Third or Sixth Circuits they must meet the stringent requirements of the "control group" test which was formulated in 1962 by the District Court in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3rd Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). That court held that privilege only applied when an "employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decisions about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority." 210 F. Supp. at 485.

As exemplified by its application in the decision below, there can be no certainty under the "control group" test that communications with counsel involving corporate employees below the highest level of management will be found to be privileged. Given the mandated application of the "control group" test in two circuits coupled with the board geographic coverage of many corporations, prudence may dictate that observing the strictures of this, the most restrictive test, is the only practical alternative for corporations and their counsel to attempt to protect the confidentiality of their legal communications. Thus, a type of Gresham's Law of privilege prevails which allows a minority of the Courts of Appeals to decide the law of the land in this important area. Only a definitive ruling by this Court can remedy this situation.

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[3] In addition, in *Natta* v. *Hogan*, 392 F.2d 686 (10th Cir. 1969) the Tenth Circuit, while not required to choose between alternative tests, did approve the application of "control group" test.

2. The Committee's desire for this Court's review of the decision below is not merely because of the desirability of having a uniform standard adopted by the highest court in the land. Indeed, the Committee believes in the necessity of review in this case because of its strong belief that the widespread use of the "control group" test will hamstring the desirable process of self-evaluative "legal audits" of corporate behavior and seriously impair the ability of corporate counsel to serve their clients.

These are strong sentiments which we believe are supported by seasoned evaluations of the practical and predictable results of limiting the privilege solely to communications with employees empowered to take action on the legal advice received as the decision below has done.

There is every reason in the public interest to encourage corporations and their counsel to freely investigate corporate behavior and determine whether the law is being obeyed. Such "soul-searching" is far more likely to be honest and fruitful if corporate counsel can conduct it in a professional manner under protection of privilege. If apparent wrongdoing comes to light, the probability is slight that it could be concealed, even though the government enforcement agencies or the private litigants may have to develop the full facts on their own which, given our liberal rules of discovery and adversary system of justice, is an appropriate "burden".

Besides discouraging voluntary investigations, precise and competent legal advice generally will no longer be available to corporations and their employees thereby creating the risk of inadvertent or colorable violations of law by both individual corporate employees as well as the corporation itself. If the "control group" test is upheld, facts will be driven underground and counsel may be compelled to rely on word-of-mouth advice to senior management and to boards of directors—a method fraught with obvious shortcomings. This unfortunate and clearly dangerous practice may flow necessitously from the fact that attorneys will be hesitant to talk, let alone document any such conversations, with any corporate employee below the highest level of management. This means, quite simply, that corporate counsel will not have effective access to those very individuals who may have both the most relevant knowledge of the subject matter in question and the greatest immediate need to have competent legal advice.

Some have suggested that the availability of corporate privilege or the lack thereof, does not affect the ability of corporate counsel to obtain information from employees outside the control group.[4]

What those advocating that position fail to perceive is the recognition that, with the increase of individual employee liability for violations of federal law, the clear understanding (which counsel would be obliged to convey) by employees that whatever information they gave to corporate counsel was discoverable, either through documents or even the counsel's testimony, would lead to the Hobson's choice of either making possibly self-incriminating remarks available to the world or denying the corporate-employer the ability to gather facts necessary to defend or to correct questionable behavior. There is no reason for the corporation to conduct its internal investigations on an adversary basis in which the employees called upon to provide information must first employ their own counsel and engage in a lengthy preliminary legal exercise to determine whether indeed they may safely speak, regardless of their obvious duty to do so.

Placing potentially hundreds of thousands of corporate employees into this silent twilight world can only utterly frustrate their own and their employers' ability to obey the law. At the same time, members of the legal profession see their role as trusted advisors turned into that of unwilling witnesses of their client's confidences. The Court should not allow this disintegration of the privilege to occur.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] *See, e.g., In re Grand Jury Investigation,* 599 F.2d 1224, 1236 (3rd Cir. 1979).

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DECEMBER 19, 1979

No. 79-886

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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THE UPJOHN COMPANY AND GERARD THOMAS,
*Petitioners,*

*v.*

UNITED STATES OF AMERICA AND DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between attorneys for a corporation and corporate officers and employees, where the subject of the communications is a matter about which the attorneys' advice has been sought by the corporation, and the communications relate to the performance by the officers and employees of the duties of their employment.

2. Whether work-product materials prepared by or for attorneys in contemplation of litigation are accorded protection against involuntary disclosure in response to a summons issued under 26 U.S.C. § 7602 by the Criminal Enforcement Division of the Internal Revenue Service.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-886

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THE UPJOHN COMPANY AND GERARD THOMAS,
*Petitioners,*

*v.*

UNITED STATES OF AMERICA AND DAVID NOWAK,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR PETITIONERS

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### OPINIONS BELOW

The opinion of the court of appeals is reported at 600 F.2d 1223, and is reproduced in Appendix A to the petition for certiorari. The opinion of the Magistrate and the orders of the district court adopting that opinion are not officially reported. They are reproduced in Appendices B, C and D to the petition for certiorari, as well as at pages 171a, 210a and 212a of the Joint Appendix.

## JURISDICTION

The opinion of the court of appeals was issued on June 28, 1979. A timely petition for rehearing was denied on September 10, 1979. A petition for certiorari was filed within ninety days of the denial of the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## STATUTES INVOLVED

The pertinent parts of Sections 7402, 7602 and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.), Federal Rules of Civil Procedure 26(b)(3) and 81(a)(3), and Federal Rule of Evidence 501 are reproduced in an Appendix to this brief.

## STATEMENT OF THE CASE

This case presents for review a judgment of the United States Court of Appeals for the Sixth Circuit, which affirmed an order of the United States District Court for the Western District of Michigan enforcing a summons issued by a special agent of the Criminal Enforcement Division of the Internal Revenue Service. The summons was directed to The Upjohn Company ("Upjohn") and Gerard Thomas, its Vice President, Secretary and General Counsel. The summons demands production of the following documents and records:

> All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds

> of the Upjohn Company had been improperly accounted for on the corporate books during the same period.
>
> The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries. App. 17a-18a.

Upjohn is engaged in the manufacture and sale of pharmaceuticals. It does business in the United States and approximately 150 foreign countries. Outside the United States, its business activities are conducted through both foreign subsidiaries and foreign branches of American subsidiaries. Mr. Thomas is a member of the bars of New York and Michigan. App. 26a. He has been Upjohn's general counsel since 1961. App. 88a. As general counsel, he serves as the principal attorney for Upjohn and each of its affiliates. *Id.*

The documents sought by the summons were prepared during an investigation voluntarily instituted by Upjohn in 1976. The investigation was initiated when Mr. Thomas was informed by the Company's independent accounting firm that payments to or for the benefit of foreign governmental officials might have been made by one of Upjohn's foreign subsidiaries. The purpose of the investigation, in which Mr. Thomas was assisted by outside counsel, was to obtain information required to advise Upjohn and its subsidiaries regarding legal issues arising from such payments, including anticipated civil or criminal litigation. App. 26a-27a, 91a-92a.

During their investigation, Mr. Thomas and outside counsel interviewed approximately 86 officers or employees of Upjohn or its affiliates. Those interviewed were selected from among the members of Upjohn's senior management because they exercised supervisory authority over the expenditures of an operating unit of the Company. Mr. Thomas and outside counsel made handwritten notes during the course of their interviews reflecting factual information as well as their impressions, conclusions and opinions. App. 27a-28a, 91a-93a.

As part of the investigation, the attorneys also prepared a questionnaire, which was sent to the members of senior management responsible for the activities of Upjohn's foreign affiliates. They were instructed to answer the questionnaire fully and accurately, and to submit responses directly to "Gerard Thomas, the Company's General Counsel." The questionnaire stressed that responses should be treated as "highly confidential." They have not subsequently been disclosed, and have consistently been treated as confidential. App. 27a-28a, 93a-94a.

On March 26, 1976, the Company voluntarily submitted a preliminary report to the Securities and Exchange Commission disclosing certain questionable foreign payments. Neither at that time nor subsequently did the Commission conduct any investigation of the Company with respect to such payments. A copy of the report was contemporaneously submitted to the Internal Revenue Service. After receipt of the report, the Service began a criminal investigation of

the income tax returns of the Company for the years 1972, 1973 and 1974. App. 29a.[1]

During the course of their criminal investigation, special agents requested and were given lists of all of those who had been interviewed by Upjohn's counsel, as well as all of those who had responded to the questionnaire. The Company offered to make all of those persons, as well as any other officers or employees selected by the Service, available for interrogation. The Company also agreed to advise the Service when those resident in foreign countries were otherwise present in the United States. Many such persons travel regularly to the United States to visit Upjohn's corporate headquarters or for other purposes. App. 30a.

As part of their investigation, special agents served upon Upjohn approximately 275 Information Document Requests. In response, the agents were afforded access to extensive information from the books and records of Upjohn, its branches and subsidiaries. In addition, the agents interrogated at least 25 of the employees who had previously been interviewed by Upjohn's counsel. Certain of the interviews were conducted by the Service outside the United States. App. 76a-77a. The Service has never been refused an interview with any officer or employee of the Company. From time to time, Upjohn informed the Service that

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[1] The inquiry conducted by Mr. Thomas and outside counsel continued after the initiation of the Service's investigation. As a result of additional information obtained by them, an amendment to the Company's preliminary report was filed with the Securities and Exchange Commission on July 29, 1979 and submitted contemporaneously to the Internal Revenue Service.

officers or employees based overseas would be in the United States. In some instances, the Service did not elect to utilize those opportunities for interrogation.

During the Service's investigation, no objections were made by Upjohn to inquiries into payments made by foreign branches and other entities which might have affected the Company's consolidated United States tax returns. On grounds of relevance, however, Upjohn's counsel declined to allow inquiries into questionable payments made by Upjohn's foreign subsidiaries without a prior showing that such payments could have affected the Company's consolidated United States tax returns.[2] No effort was ever made by the Service, by summons or any other procedure, to compel any witness to answer any questions regarding matters that Upjohn contends cannot have affected its United States tax liability.

In addition, Upjohn voluntarily provided to the Service two schedules summarizing all of the questionable payments discovered by the Company's attorneys. App. 69a-71a. One schedule lists the date, amount, payor and country of all questionable payments which the Com-

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[2] Upjohn contended that questionable payments made by subsidiaries which were "controlled foreign corporations" within the meaning of 26 U.S.C. § 952(c) could not have affected its own consolidated tax returns for the years in question. Under the tax laws as they existed prior to 1976, overseas bribes or kickbacks—which would not be deductible on a United States tax return if made by a United States taxpayer—would have reduced the earnings and profits of the controlled foreign corporation and thus would have been properly eliminated from "subpart F income" under 26 U.S.C. § 952 which was taxable to Upjohn, the United States parent. On November 28, 1977, the Service issued Revenue Ruling 77-442, 1977-2 C.B. 264, which formally adopted Upjohn's contention on the issue.

pany concedes might be relevant to its consolidated United States tax returns. The other schedule provides descriptive information regarding payments which the Company believes cannot have affected its United States tax liability. Special agents of the Service were permitted to inspect all documents and records discovered during Upjohn's investigation regarding payments included in the first schedule. These included such materials as cancelled checks, invoices and vouchers. App. 30a.

Despite the extensive information available to it, the Service insisted that it also be provided with the attorneys' notes of interviews and the responses to their questionnaire. On November 23, 1976, prior to conducting any interview of any Upjohn employee, a special agent issued the summons in dispute here. Upjohn promptly declined to produce two of the categories of documents sought by the summons, the attorneys' interview notes and the responses to counsel's questionnaire, on grounds that they are privileged communications between client and attorney and constitute the work-product of attorneys prepared in anticipation of litigation.

On August 31, 1977, more than nine months after the summons was issued, the United States filed a petition for enforcement in the district court. The matter was referred by the district court to a Magistrate, who concluded that application of the attorney-client privilege should be limited to communications made to counsel by members of Upjohn's "control group." He was of the view that none of the officers and employees from whom Upjohn's attorneys had obtained information was a member of such a "control group."

The Magistrate also concluded that the Service had made a sufficient showing of necessity to overcome the protection of the work-product rule. On the basis of these conclusions, he recommended to the district court that the summons be enforced. App. 171a. The district court adopted the Magistrate's opinion in a brief order. App. 210a, 212a.

The court of appeals recognized that the scope of the attorney-client privilege as applied to corporations is now disputed and uncertain. It acknowledged that other circuits have held that communications made to counsel by subordinate corporate employees are generally privileged if the subject of the communications is a matter about which counsel has been requested to provide legal advice and if it involves the performance by the employees of their corporate duties. Nonetheless, the court of appeals rejected such a rule, and aligned itself with those courts which have approved the more restrictive "control-group" test recommended by the Magistrate.

With respect to the work-product issue, the court of appeals did not consider whether the protection usually accorded work-product materials had been overcome by a showing of necessity. Instead, it stated in a brief footnote that no such protection is available in responding to a summons issued by the Service pursuant to 26 U.S.C. § 7602. The court remanded to the district court for the limited purpose of determining which of the officers and employees from whom Upjohn's attorneys received communications were part of the Company's "control group."

## SUMMARY OF ARGUMENT

### I

The purpose of the attorney-client privilege is to enable clients to obtain legal assistance from counsel fully informed of the relevant facts. The privilege thus plays an important role in promoting observance of law and the effective administration of justice. This purpose applies to corporate as well as individual clients. Almost every aspect of a corporation's conduct is subject to statutory or regulatory requirements. Many of these are complex and pervasive. In order to achieve and maintain compliance with these requirements, corporations need continuing assistance from counsel fully informed of all relevant aspects of the corporation's conduct.

If the privilege is to serve its intended purpose, all corporate employees who have relevant knowledge of matters on which counsel's assistance has been sought must be able to speak candidly to the attorney without fear that he may subsequently become a witness against them or their employer. Adoption of a subject-matter test for the application of the attorney-client privilege to corporations will protect from involuntary disclosure, and thus encourage, candid communications between corporate employees and counsel. Such a test will, as several lower federal courts and state courts generally have recognized, best promote the essential objectives of the privilege. In addition, it will facilitate counsel's important efforts to bring about compliance with the multitudinous laws and regulations that govern corporate conduct.

The subject-matter test does not protect relevant evidence from discovery or encourage irresponsibility

on the part of company executives; indeed, as in this case, it encourages voluntary compliance efforts and facilitates enforcement action by public authorities. The control-group test adopted by the court of appeals rests upon a misconception of the nature and structure of a corporation, which acts through and is bound by all its employees—not merely by a few senior executives who cannot have full knowledge of every corporate action that may have legal implications. To define the privilege so narrowly would deprive corporations of informed legal assistance and seriously prejudice observance of the law and the efficient administration of justice. In addition, because of the unpredictability inherent in the concept of the control group, it would significantly hamper the efforts of corporate managers and counsel to comply with the law's complex requirements, without the intervention of public authorities, and would discourage voluntary legal investigations, such as that involved in this case.

## II

The work-product rule, articulated over thirty years ago in *Hickman* v. *Taylor,* 329 U.S. 495 (1947), but with sources deep in both state and English practice, is an essential bulwark of the adversary system. It assures a litigant or prospective litigant that his lawyer represents his interest and only his interest. It safeguards the lawyer's knowledge, analyses and litigation strategy against involuntary disclosure to an adversary.

When the Internal Revenue Service issues an administrative summons against a taxpayer—whether a corporation or an individual—it establishes an intensely adversarial relationship. The statute authoriz-

ing such summonses contains no suggestion that the recipient is to be denied the protection of the work-product rule. Nothing in the legislative history of the authorizing statute provides a basis for implying any intention to deny such protection. Indeed, in related situations Congress has acted promptly to strengthen the protections afforded taxpayers against the Service's demands.

Apart from the almost cursory observation of the court below, no court has held that the issuance of a summons by the Service eliminates work-product protection. Moreover, the result reached by the court below cannot logically be limited to summonses issued by the Service; it would with equal force deny work-product protection to recipients of summonses from a wide range of governmental agencies whose statutory summons authority cannot in principle be distinguished from that of the Service. If that view were accepted, it would follow that, despite the considerations underlying *Hickman* v. *Taylor,* which have never been questioned by Congress, work-product protection would no longer be available in a substantial and important part of the litigation in the federal courts.

The Service has a powerful arsenal of investigatory weapons for use in the enforcement of the tax laws, both in this country and abroad. It has declined to use many of those weapons in this case. Instead, it seeks a shortcut through access to the fruits of counsel's efforts in anticipation of litigation. If the mere convenience of an adversary were controlling, there would be no work-product protection at all. The asserted convenience of the Service in this case cannot establish an intention on the part of Congress to eliminate work-product protection or demonstrate

the requisite hardship that must be shown to overcome such protection.

## ARGUMENT

### I.

### THE MATERIALS DEMANDED BY THE SUMMONS SHOULD BE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AGAINST INVOLUNTARY DISCLOSURE

The first issue presented is whether the confidential communications between Upjohn's counsel and its officers and employees are protected by the attorney-client privilege. The court of appeals concluded that only one of the established requirements [3] for the privilege's protection was not satisfied: Whether the officers and employees to and by whom the communications were made constituted part of counsel's "client" for purposes of the privilege.[4] The court of appeals held that, in the case of a corporation, the "client" consists only of the corporation's controlling group of central managers.[5]

In so holding, the court aligned itself with those courts that have adopted the standard for the application of the privilege first announced in *City of Phila-*

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[3] *E.g.*, United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[4] The court found or left undisturbed findings that legal advice had been sought by Upjohn from professional legal counsel, Pet. App. 12a-13a; App. 174a-175a; that the employees' communications related to the purposes for which that legal advice was sought, *id.* at 13a; App. 175a; that the communications were made in confidence, *id.* at 14a; App. 176a; and that the protection of the privilege has not been waived, Pet. App. 7a n.12; 600 F.2d at 1227 n.12.

[5] Pet. App. 1a; 600 F.2d at 1227.

*delphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa.), *mandamus & prohibition denied sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). Although decisions following *City of Philadelphia* have frequently reached irreconcilable results, they have generally sought to limit the privilege to communications with a small group of senior corporate managers who have authority to make, or to take substantial part in, a decision that the corporation might make on the attorney's advice. The court of appeals refused to follow several courts that have rejected this control-group test, and have applied the privilege to communications made by subordinate employees to corporate counsel where the subject matter of the communications relates to the employees' duties of employment. *E.g.*, *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd by an equally divided court*, 400 U.S. 348 (1971); *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc).[6]

**A. The Important Public Policies Served by the Privilege Require That It Be Afforded a Wider Scope of Application.**

Throughout our legal history, courts and commentators have recognized that the attorney-client privilege is essential to the effective administration of justice.

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[6] Although either the control-group or the subject-matter test has been applied by most of the courts that have considered this question, some courts have adopted variations upon, or amalgamations of, those tests. *E.g.*, Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978); Duplan Corp. v. Deering Millikin, Inc., 397 F. Supp. 1146 (D.S.C. 1974), *aff'd on other grounds*, 540 F.2d 1215 (4th Cir. 1976); Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35 (E.D.N.Y. 1973).

More than 150 years ago, Mr. Justice Story observed that the privilege "is indispensable for the purposes of private justice." *Chirac* v. *Reinicker,* 24 U.S. (11 Wheat.) 280, 294 (1826). *See also Fisher* v. *United States,* 425 U.S. 391, 403 (1976); *Hunt* v. *Blackburn,* 128 U.S. 464, 470 (1888); *Connecticut Mutual Life Insurance Co.* v. *Schaefer,* 94 U.S. 457, 458 (1876); *Blackburn* v. *Crawfords,* 70 U.S. (3 Wall.) 175, 192-93 (1865). An early state court opinion emphasized that "[t]here is no principle of law which rests on a sounder basis, or which is supported by a more uniform chain of adjudication." *Parish* v. *Gates,* 29 Ala. 254, 259 (1856). More than a century later, a noted commentator described the privilege as perhaps "the pivotal element of the modern American lawyer's professional functions." Hazard, *An Historical Perspective on the Attorney-Client Privilege,* 66 Cal. L. Rev. 1061, 1061 (1978).[7]

Adherence to the privilege is commanded by important public policies. The purpose of the privilege is ultimately to assure full and candid communications between attorney and client. It "rests on the need for advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel* v. *United States,* 100 S.Ct. 906, 913 (1980). It is only upon the basis of such communications that "the abil-

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[7] Similar policies have long been adhered to by the English courts, as well as the courts of numerous other foreign jurisdictions. A compilation of opinions on foreign law by attorneys practicing in a number of common law and civil law jurisdictions was filed with this Court on August 3, 1970 by the Respondents in Decker v. Harper & Row Publishers, Inc., No. 113, October Term 1970, 400 U.S. 348 (1971).

ity to obtain informed legal advice will remain unfettered." *Fisher* v. *United States,* 425 U.S. at 404.

The attorney-client privilege is essential to the interests of justice, as well as the interests of the client.[8] *Id.* Without frank communications between counsel and client, unmeritorious claims may be pressed in wasteful litigation, and meritorious claims or interests may not be identified or pursued. Without such candor, the attorney cannot effectively keep his client abreast of relevant developments in the law, apprised of potential legal issues, or informed as to the legally appropriate manner in which to arrange his affairs. Needless controversy, inefficiency and injuries to the interests of others may result.[9]

The public policies underlying the attorney-client privilege are applicable whether the client is an individual or a corporation. No less than an individual, a corporate enterprise requires the assistance of informed legal counsel. If a corporation's attorney is denied full and candid information regarding his client's conduct and practices, the same needless controversies may occur, the same inefficiencies will result, and the same injuries to others are threatened.[10]

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[8] *E.g.*, Miller, *The Challenges to the Attorney-Client Privilege,* 49 Va. L. Rev. 262, 268-69 (1963) [hereinafter cited as Miller].

[9] *E.g.*, Simon, *The Attorney-Client Privilege as Applied to Corporations,* 65 Yale L.J. 953, 955 (1956).

[10] An empirical study suggests that clients are well aware of the privilege, and that it induces them to be candid with their attorneys. Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine,* 71 Yale L.J. 1226, 1262 (1962). It also suggests that attorneys are heavily influenced by the existence of the privilege in encouraging candor on the part of clients. *Id.* at 1270. On the

For these reasons, this Court has long recognized that the protection of the privilege is afforded corporate as well as individual clients. *E.g., United States* v. *Louisville & Nashville Railroad,* 236 U.S. 318, 336 (1915).[11] Indeed, as we show below, the purposes served by the privilege are even more compelling in the case of corporations, particularly those that are large and diversified.

**B. The Realities of Modern Corporate Organizations Require That the Privilege Be Afforded a Wider Scope of Application.**

Resolution of the issue presented here must take into account the structure of modern corporate organizations. That structure underscores the importance of the policies which the attorney-client privilege is intended to promote, and makes clear that a grudging construction of the scope of the privilege, such as that adopted by the court below, is contrary to the interests of both corporate clients and the public.

Extensive studies have been conducted in recent years regarding corporate structures and intra-corporate communication processes. Two principles significant to the issues of this case emerge from those studies. First, corporations, particularly large and diversified corporations, are characteristically decentralized, and corporate employees at their middle and lower

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other hand, the survey shows that judges do not consider the privilege disruptive of the administration of justice and only seldom find that it excludes evidence that is of substantial importance. *Id.* at 1272.

[11] *See also, e.g.,* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 322 (7th Cir. 1963); Garner v. Wolfinbarger, 430 F.2d 1093, 1097 n.10 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971); United States v. United Shoe Machinery Corp., 89 F. Supp. at 358-59.

levels are often delegated significant discretion regarding major business activities.[12] Indeed, one court has found that relatively low-ranking employees frequently exercise greater actual authority than more senior executives over significant aspects of a corporation's affairs. *Commonwealth* v. *Beneficial Finance Co.*, 360 Mass. 188, 275, 275 N.E.2d 33, 83 (1971), *cert. denied*, 407 U.S. 910, 914 (1972).

The discretion afforded subordinate employees can, and frequently does, result in serious corporate liability. Under established principles of agency, knowledge acquired by an employee during the course of employment is imputed to the corporation. *E.g., Franklin Supply Co.* v. *Tolman*, 454 F.2d 1059, 1070 (9th Cir. 1972); *Bailey* v. *Gulf Insurance Co.*, 389 F.2d 889, 891 (10th Cir. 1968). Moreover, within their apparent or actual authority, corporate employees can bind the corporation and subject it to liability in tort or under the criminal laws.[13] *See generally* 10 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, §§ 4877 *et seq.*, §§ 4942 *et seq.* (rev. perm. ed. 1978). A corpora-

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[12] *See, e.g.*, Developments in the Law—*Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1254 & n.61, 1259 & n.78 (1979) [hereinafter cited as *Corporate Crime*]; Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 Va. L. Rev. 1099, 1140 (1977) [hereinafter cited as Coffee].

[13] The doctrine of *respondeat superior* has long been part of the law. *See, e.g.*, Hern v. Nichols, 1 Salk. 289 (1709); Philadelphia, Wilmington & Baltimore R.R. v. Quigley, 62 U.S. (21 How.) 202, 210 (1858); Lake Shore & Michigan Southern Ry. v. Prentice, 147 U.S. 101, 107 (1893); New York Central & Hudson River R.R. v. United States, 212 U.S. 481, 483 (1909); United States v. A & P Trucking Co., 358 U.S. 121, 125 (1958).

tion may be held criminally liable for its employee's misconduct even if the illegal action was expressly forbidden by his supervisors, and even if it occurred despite good-faith efforts to prevent it.[14]

The second principle significant here is that central management realistically cannot be aware of all that occurs within large corporate enterprises. Studies of corporate behavior have concluded that an important factor leading to wrongful or illegal conduct by employees is the difficulty of the communication process between central policy makers and lower-echelon employees.[15] Corporate executives often cannot effectively explain to subordinate employees what conduct is wrongful or illegal.[16] Even when their instructions are clearly understood, there may be serious difficulties in implementing those instructions in the field.[17] Communications upward to central management are also imperfect. Corporate managers frequently receive so much information from within the organization that they may be unable to perceive the existence or seriousness of a problem.[18]

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[14] *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000, 1006-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). *See also* Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 Yale L.J. 1091, 1095 (1976).

[15] *E.g.*, Sonnenfeld & Lawrence, *Why Do Companies Succumb to Price-Fixing?*, 1978 Harv. Bus. Rev. 145, 146 (July-Aug.) [hereinafter cited as Sonnenfeld & Lawrence].

[16] Whiting, *Antitrust and the Corporate Executive II*, 48 Va. L. Rev. 1, 15 (1962).

[17] *Corporate Crime*, 92 Harv. L. Rev. at 1275 n.168.

[18] Coffee, 63 Va. L. Rev. at 1139 n.147. Nobel laureate economist Kenneth Arrow has observed the same problem: "[T]he overload

As a result of these difficulties, many observers have recognized that corporate counsel must perform important roles in communicating and implementing legal policy at all levels of the corporate structure. Indeed, it has been suggested that attorneys should conduct regular internal corporate inquiries to prevent illegal or wrongful activity.[19] Counsel can, however, perform these important responsibilities effectively only if he has detailed and accurate information regarding the corporation's actual practices and conduct. *Compare Trammel* v. *United States,* 100 S.Ct. at 913. Because of the decentralization and complexity of large corporate structures, such information realistically is available only if counsel engages in direct and candid communications with subordinate corporate employees.[20]

The importance of counsel's participation in corporate self-regulation is increased by the multiplicity of laws, directives and regulations confronting the modern corporation. Elaborate webs of legal requirements now surround virtually every activity of large corporate enterprises.[21] Those requirements are often

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of the information and decision making capacity'' leads organizational managers to disregard negative information which is not ''congruent with previous beliefs.'' K. Arrow, The Limits of Organization 73-75 (1974).

[19] *Administered Prices: Hearings Pursuant to S. Res. 52 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 87th Cong., 1st Sess. 17425, 17645, 17713-14 (1961).

[20] *E.g.,* Sonnenfeld & Lawrence, 1978 Harv. Bus. Rev. at 151-52, 154, 156.

[21] Detailed federal and other governmental requirements now reach disparate matters ranging from pricing policies to employment practices, from safety goggles to chemical waste disposal. The detail and comprehensiveness of these multitudinous provi-

subtle and complex, and careful legal analyses frequently are needed to distinguish lawful from unlawful conduct. As this Court recently observed with respect to the Sherman Act, "the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978). Conduct falling close to the prohibited area may be "salutary and procompetitive" and should be encouraged. *Id.* at 441. Subordinate corporate employees cannot, however, reasonably be expected to understand, or even be aware of, the gossamer distinctions of the antitrust laws, safety and environmental regulations, prohibitions against employment discrimination, state and federal tax laws and numerous other important governmental requirements. As a practical matter, large corporations can effectively persuade their employees to conform to these and other legal requirements only if those employees are encouraged to speak candidly with, and are permitted to receive frank legal advice from, the corporation's attorneys.[22]

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sions are illustrated in, for example, Council on Wage and Price Stability, *Catalog of Federal Regulations Affecting the Iron and Steel Industry* (1976), and Small Business Administration, *Catalog of Federal Paperwork Requirements* (1979).

[22] There is overwhelming evidence that numerous governmental programs and policies depend primarily for effective implementation and enforcement upon voluntary compliance, assisted and directed by the efforts of corporate counsel. Without the effective intervention of corporate counsel as agents of voluntary law enforcement, such programs and policies would be substantially less successful. *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. at 1164; Burnham, *The Attorney-Client Privilege in the Corporate Arena,* 24 Bus. Law. 901, 913-14 (1969) [hereinafter

**C. The Privilege Should Encompass Communications Between Counsel and All Corporate Employees Who Have Information Relevant to Advice Sought by the Corporation From Counsel.**

The formulation of the subject-matter test recently adopted by the Eighth Circuit in *Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir. 1978) (en banc), provides an appropriate framework for the resolution of this complex issue. Unlike the control group test applied by the court below, the subject-matter test vindicates the important public policies served by the attorney-client privilege and takes adequate account of the realities of corporate structures and decision-making. This test, first suggested by Judge Weinstein, is designed to "strike a balance between the privilege's goal of promoting freedom of consultation and full disclosure between attorney and a seeker of legal services, and the law's need for relevant evidence." 2 J. Weinstein & M. Berger, *Commentary on Rules of Evidence for United States Courts and Magistrates* ¶ 503(b)[04], at 503-44 (1979) [hereinafter cited as Weinstein & Berger]. The requirements of the test are:

(1) The communication must have been made for purposes of seeking legal advice, that is, "in contemplation of future professional action by the attorney." *Id.* at 503-45.[23]

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cited as Burnham]; Shenefield, *Compliance Programs As Viewed from the Antitrust Division,* 48 Antitrust L.J. 73 (1979) [hereinafter cited as Shenefield]; Note, *The Attorney-Client Privilege for Corporate Clients: The Control Group Test,* 84 Harv. L. Rev. 424, 425 n.6 (1970).

[23] Judge Weinstein observes that for purposes of this standard "[i]t is irrelevant whether [the attorney] was acting as house counsel or outside counsel." *Id.*

(2) The employee making the communication must have done so at the direction of a corporate superior.

(3) The corporate superior must have directed the employee to communicate with the attorney for purposes of securing legal advice for the corporation.[24]

(4) The subject matter of the communication must concern the employee's duties for the corporation.[25]

(5) Consistent with the size and nature of the corporation, the communication must not have been disseminated beyond those persons who actually have a need to know its contents.

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[24] The directions called for in the second and third requirements were unquestionably issued in this case, App. 27a-28a, but it should be observed that in many situations such directions might, for example, have to be inferred from more general directions given by a corporate superior to the attorney, in which subsequent communications with subordinate employees were contemplated. In many situations, a rigid requirement that explicit instructions be issued by corporate superiors directly to their subordinates would exalt form over substance. The central point of the requirement is presumably only that the employee have acted in accordance with his corporate responsibility.

[25] Although the issue is not important for purposes of this case, it would appear that here, as with the second and third requirements, an unduly rigid interpretation would needlessly limit the privilege's application in other cases. Any information that relates to the corporation's business activities or practices should satisfy this requirement, even if, for example, provided by an employee in one department or function about the wrongdoing of another employee in another department or function. An employee's "duties" to the corporation should not, in other words, be narrowly restricted to the day-to-day performance of his personal functions, but should instead encompass his responsibility to help assure the lawful and effective operation of all elements of the corporation.

Application of the test described above would bring within the privilege's protection all or virtually all[26] of the communications at issue here. Nonetheless, petitioners do not believe that each of the proposed requirements need necessarily be adopted in the form suggested by Judge Weinstein, or in the form approved by the Eighth Circuit in *Diversified*. It should suffice if a corporation's attorney-client privilege were understood to encompass all communications made in confidence by corporate employees to corporate counsel regarding matters within their knowledge as employees and relevant to advice sought by the corporation from counsel. Adoption by this Court of such a principle would assure counsel access to all of the information relevant to his professional responsibilities, permit a reasonable degree of flexibility in the privilege's application, and leave appropriate room for reasoned application of the test in the lower courts.[27]

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[26] Certain of the persons to and from whom communications were made evidently were no longer employed by Upjohn at the time of the communications. App. 175a. Petitioners believe that, regardless of the test adopted by the Court, the privilege should encompass communications between former employees and counsel regarding a corporation's affairs during the period of their employment, if the privilege's protection would otherwise be applicable. *See* United States v. Lipshy, 1979-2 U.S. Tax Cas. (CCH) ¶ 9628, at 88,278 (N.D. Tex. 1979); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. at 1165-67. *Compare* Fed. R. Crim. P. 16(a)(1)(A); United States v. Hughes, 413 F.2d 1244, 1253 (5th Cir. 1969), *cert. vacated as moot,* 397 U.S. 93 (1970).

[27] In commenting on a test similar to that proposed here, one commentator observed that:

> Because this approach would provide a court with a set of objective standards for determining whether an employee functions as a corporate client, an attorney should be able to predict with a reasonable degree of certainty whether a contemplated communication would be privileged. The unpredictability that would remain would be little more than that

**D. The Principles of the Subject-Matter Test Are Supported by State Authority, to Which Reasonable Deference Should Be Given.**

In adopting Federal Rule of Evidence 501, Congress recognized that the societal interests and relationships served by the evidentiary privileges have traditionally been regulated by the states, and it sought to protect state policies against unnecessary erosion or compromise.[28] Consistent with that purpose, this Court only last Term carefully considered state law decisions in determining the proper scope of the marital privilege. *Trammel* v. *United States,* 100 S.Ct. at 911-12, nn.9-10.[29]

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which presently faces an attorney with an individual client, since the suggested approach would be analogous to the personal privilege. The increased predictability would thus promote the major purpose of the privilege—fostering the freedom to seek legal advice—by removing fears that the attorney might subsequently be compelled to disclose the communication.

Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 Mich. L. Rev. 360 (1970).

[28] Congress rejected a more rigid rule drafted by the Advisory Committee on the Proposed Federal Rules of Evidence, and instead instructed the federal courts to define the scope of privileges in federal question cases by reference to "the principles of the common law as they may be interpreted . . . in light of reason and experience." It did so after numerous objections that the proposed rule would have seriously undermined state policies. It is significant that no other portion of the proposed rules received such careful attention, or underwent such extensive revision. *See* S.Rep. No. 93-1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7051; 120 Cong. Rec. 40891 (1974) (remarks of Rep. Hungate).

[29] It has been argued that the impact of state law is even greater, since Congress should not, under ordinary circumstances, be able to abrogate the states' law of privilege, even in cases involving federal law. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today,* 31 Tul. L. Rev. 101, 119-20 (1956). While this Court appears to have rejected Professor

The attorney-client relationship also involves substantial state interests, reflected in long-standing state regulatory systems, and a similar consideration of state authorities is appropriate here. *Garner* v. *Wolfinbarger,* 430 F.2d at 1100. *See also* Comment, *Evidentiary Privileges in the Federal Courts,* 52 Cal. L. Rev. 640, 648 (1964).

The overwhelming majority of state courts afford corporations protection under the attorney-client privilege substantially similar to that provided by the subject-matter test. For example, the California Supreme Court held in *D.I. Chadbourne, Inc.* v. *Superior Court,* 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964), that "the public policy behind the attorney-client privilege requires that an artificial person be given an equal opportunity with a natural person to communicate with its attorney, within the professional relationship, without fear that its communications will be made public." *Id.,* 60 Cal. 2d at 736, 388 P.2d at 709, 36 Cal. Rptr. at 477. It concluded that communications made by lower-level corporate employees to the corporation's counsel are privileged if they were made in confidence for the purpose of securing legal advice for the corporation. *Id.* The decision in *D.I. Chadbourne* reflects the virtually unanimous view of those states that have considered the question. *See, e.g., Stewart Equipment Co.* v. *Gallo,* 32 N.J. Super. 15, 17, 107 A.2d 527, 528 (1954); *Ford Motor Co.* v *O.W. Burke Co.,* 59

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Louisell's constitutional argument, *see, e.g.,* United States v. Gillock, 100 S. Ct. 1185, 1191 (1980), his reasoning nevertheless strongly supports giving state law significant weight in determining the scope of privileges in federal question cases.

Misc. 2d 543, 546, 299 N.Y.S.2d 946, 949 (Sup. Ct. 1969).[30]

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[30] The following additional states have indicated, by rule or judicial decision, preference for a broad test in defining the scope of the attorney-client privilege for corporations: *Alabama:* Jay v. Sears, Roebuck & Co., 340 S.2d 456, 457-58 (Ala. Civ. App. 1976); *Delaware:* Wise v. Western Union Telegraph Co., 178 A. 640, 644 (Super. Ct. 1935); Texaco, Inc. v. Phoenix Steel Corp., 36 Del. Ch. 456, 461, 264 A.2d 523, 524 (1970) (adopting *United Shoe Machinery* test); *Georgia:* Fire Ass'n v. Flemming, 78 Ga. 733, 3 S.E. 420, 422-23 (1887); *Kansas:* Kan. R. Civ. Proc. 60-426(c) (communications to counsel through "authorized representative" of corporation is privileged); *Minnesota:* Schmitt v. Emery, 211 Minn. 547, 552, 2 N.W.2d 413, 416 (1942); *Montana:* State ex rel. Union Oil Co. v. District Court, 160 Mont. 229, 337, 503 P.2d 1008, 1012 (1972); *Missouri:* Lindberg v. Safeway Stores, Inc., 525 S.W.2d 571, 572 (Mo. Ct. App. 1975); State ex rel. Terminal R.R. Ass'n of St. Louis v. Flynn, 363 Mo. 1065, 1072, 257 S.W.2d 69, 73 (1953); *Nevada:* Nev. Code Tit. 4 ch. 49 § .045 (1971); *Ohio:* Ex parte Schoepf, 74 Ohio St. 1, 15, 77 N.E. 276, 279 (1906); *Pennsylvania:* Davenport Co. v. Pennsylvania R.R., 166 Pa. 480, 486, 31 A. 245, 246 (1895); *South Dakota:* S. D. Code Tit. 19 ch. 13 §§ 2-3 (Rules of Evidence 502 (a) & (b) (1979)); *Utah:* Jackson v. Kennecott Copper Corp., 27 Utah 2d 310, 314-15, 495 P.2d 1254, 1257 (1972) (adopting *United Shoe Machinery* test); *Virginia:* Robertson v. Commonwealth, 181 Va. 520, 540, 25 S.E.2d 352, 360 (1943); *Wisconsin:* Wis. Code § 905.03 (1)(a) (1975), State v. Circuit Court for Waukesha County, 15 Wis. 2d 311, 318, 112 N.W.2d 686, 689 & n.3 (1961); Horlick's Malted Milk Co. v. A. Speigel Co., 155 Wis. 201, 212, 144 N.W. 272, 276 (1913).

Only one state's appellate courts have indicated an inclination toward the narrow control-group test. *See* Day v. Illinois Power Co., 50 Ill. App. 52, 199 N.E.2d 802, 806 (1964). That ruling, although cited in dicta in several later cases of the intermediate appellate courts, has been seriously undermined by the Illinois Supreme Court's decision in Cox v. Yellow Cab Co., 61 Ill. 2d 416, 419-20, 337 N.E.2d 15, 18 (1975). While the *Cox* court had no occasion to resolve the issue, it recited various of the considerations which would govern such a ruling, citing and relying upon *D. I. Chadbourne*, giving a strong indication of its leaning towards the broad approach adopted in that case. It is apparent that the issue has not been finally determined by the Illinois courts.

These decisions by the state courts strongly confirm that the subject-matter test should be adopted by this Court to define the scope of the privilege's protection to corporations. They embody the "principles of the common law" which Congress expected to be utilized to define federal privileges. Fed. R. Evid. 501. Consistent with both the directions of Congress and this Court's decision in *Trammel,* they are entitled to substantial weight. Moreover, even apart from their persuasiveness as authorities, they reflect well-considered state policies, regarding matters of long-standing state interest. The adoption of a federal rule that afforded substantially less protection to the attorney-client relationship, such as that approved by the court below, would seriously undermine these important state policies.[31]

**E. The Court of Appeals' Reasons for Rejecting the Subject-Matter Test Are Invalid.**

The court of appeals below sought to explain its adoption of the narrow control-group test in the following terms:

> The "subject matter" test encourages senior managers purposely to ignore important information they have good business reasons to know and use.

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[31] A federal rule of privilege significantly narrower than prevailing state privileges would inevitably displace the state rules in a substantial number of situations. In any situation in which an issue or potential issue might have federal as well as state law implications, prudent counsel would necessarily have to conduct themselves in conformity with the narrower rule. The pervasiveness of federal law in corporate transactions, particularly those involving interstate commerce, would assure very broad application of the federal rule and widespread displacement of state policies.

> Corporate counsel should not be the exclusive repository of unpleasant facts. The law should not encourage corporate managers to shield themselves from information about possibly illegal transactions. Such purposeful ignorance does not serve the interests of moral corporate conduct or the protection of stockholder equity. Pet. App. 5a-6a; 600 F.2d at 1227.

The court's analysis is mistaken in every detail. It misconceives the implications of the subject-matter test and the circumstances of this case. Far from producing the disadvantages asserted by the court, the subject-matter test is well calculated to achieve the public policies which the privilege is intended to promote and to facilitate corporate compliance with legal and regulatory requirements.

At the outset, it is important that the subject-matter test cannot in any sense render counsel "the exclusive repository of unpleasant facts." Under any formulation of the privilege, information obtained by an attorney from corporate employees remains with those employees, and is thus always fully subject to investigation and discovery.[32] The issue here is not whether

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[32] The fact that a corporate employee has communicated with a lawyer regarding a transaction cannot cloak the employee's knowledge with immunity from disclosure. As one court has explained,

> [T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question. "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

City of Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962) (emphasis in original). *See also* Grant v.

the knowledge of an employee should be discoverable but instead whether it should be obtained through seizure of communications made in confidence to the corporation's counsel. Whether the privilege is defined narrowly or broadly, the only protected material is the actual communication made to or from an attorney.

For the same reasons, there is no basis for the court's assertion that the subject-matter test encourages "purposeful ignorance" among corporate managers. Here again, whatever the scope of the privilege, any information held by corporate officers or employees remains always subject to discovery, and a government agency or adversary may discover that knowledge whether or not it is reported internally to senior management. More important, the availability of the privilege's protection can only encourage management's efforts to obtain all of the facts it requires to take appropriate action. Without such assurances, management will be more fearful to ask, and employees more fearful to answer, questions that threaten possible civil or criminal liability. It is the absence of adequate protection under the privilege, and not its existence, that encourages "purposeful ignorance."

In fact, the circumstances of this case illustrate clearly that the court's suggestion is without basis. Upjohn authorized counsel's inquiries precisely in or-

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United States, 227 U.S. 74, 79 (1913); Balistrieri v. O'Farrell, 57 F.R.D. 567, 569 (E.D. Wis. 1972).

In this case, for example, the Service remains free to interrogate any or all of Upjohn's officers or employees it deems appropriate, and indeed it has already interviewed, in some instances more than once, at least 25 of those persons. App. 76a. In addition, it has already obtained extensive documents and records from Upjohn, and it may, if it elects, seek any other relevant materials it regards as appropriate to its purposes.

der to determine the facts regarding the reported foreign payments. It did so because it required informed legal advice in order to conform its conduct to applicable legal requirements, and in anticipation of litigation. As a result of counsel's inquiries, Upjohn was able to conform to policies adopted by the Securities and Exchange Commission, and to provide information to the Internal Revenue Service, its shareholders and the investing public. By any standard, the internal legal inquiries conducted by counsel on behalf of Upjohn advanced the public interest.

Nor does the fact that corporations sometimes select counsel to conduct legal inquiries, such as that involved here, suggest any untoward purpose. Management may wish such inquiries to be conducted by counsel to assure both the appearance and reality of objectivity.[33] Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications With Investigative Counsel,* 35 Bus. Law. 5, 9 (1979) [hereinafter cited as Block & Barton]. Moreover, a corporation's managers may lack the expertise to conduct an effective evaluation, which often depends heavily upon legal issues and legal standards. *Id.* Such inquiries demand a knowledge of legal requirements, as well as training in marshalling and evaluating complex facts, skills not always found even in senior management.

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[33] Government agencies have recognized that the participation of counsel may lend objectivity and impartiality to internal corporate inquiries. For example, the Securities and Exchange Commission has in a number of consent judgments compelled corporations to retain counsel for purposes of such inquiries regarding questionable foreign practices. *See, e.g.*, SEC v. Lockheed Aircraft Corp., [1976] Fed. Sec. L. Rep. (CCH) ¶ 95,509 (D.D.C. 1976).

In addition, the court of appeals sought to criticize the subject-matter test because it would assertedly bring within the privilege's protection communications by a client's servants and agents, rather than the client himself. Pet. App. 4a, 600 F.2d at 1226. The court evidently assumed for this purpose that only a corporation's central managers are analogous to an individual client. Even if it could be assumed that subordinate employees are not part of corporate counsel's "client," the court's criticism would be without merit. It is a "virtually . . . universal rule" in the state courts that the privilege encompasses communications even if they were made "by an agent or employee of the client, rather than by the client himself." Annot., 139 A.L.R. 1250, 1251 (1942). *Accord,* 8 Wigmore, *Evidence,* § 2317, at 618-19 (1961).[34]

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[34] *See also, e.g.,* Rodriguez v. North American Rockwell Corp., 28 Cal. App. 2d 441, 449, 104 Cal. Rptr. 678, 683 (1972); In re Petition of Delaware, 91 Mich. App. 399, 405, 283 N.W.2d 754, 757 (1979); Riddle Spring Realty Co. v. State, 107 N.H. 271, 274, 220 A.2d 751, 755 (1966); Ellingsgard v. Silver, 352 Mass. 34, 40, 233 N.E.2d 813, 817 (1967); In re Hyde, 149 Ohio St. 407, 413, 79 N.E.2d 224, 227 (1948); Brink v. Multnomah County, 224 Or. 507, 516-17, 356 P.2d 536, 540 (1960); Robertson v. Commonwealth, 181 Va. 520, 540, 25 S.E.2d 352, 360 (1943); State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 580-81, 150 N.W.2d 387, 400 (1967); Arkansas National Bank v. Cleburne County Bank, 258 Ark. 329, 332, 525 S.W.2d 82, 86 (1975); Vacalis v. State, 204 Ala. 345, 346, 86 S. 92, 93 (1920); Stanley Works v. New Britain Redevelopment Agc'y, 155 Conn. 86, 94, 230 A.2d 9, 14 (1967); Wise v. Western Union Tel. Co., 178 A. 640, 644 (Del. Sup. Ct. 1935); Grand Union Co. v. Patrick, 247 S.2d 474, 475 (Fla. Dist. Ct. App. 1971); Fire Ass'n v. Fleming, 78 Ga. 733, 738, 3 S.E. 420, 422-23 (1887); Ill. Sup. Ct. R. 201; Leyner v. Leyner, 123 Iowa 185, 187, 98 N.W. 628, 629 (1904); Kan. R. Civ. Proc. 60-426(c); Brown v. St. Paul City Ry., 241 Minn. 15, 35, 62 N.W.2d 688, 700 (1954); Nev. Code Tit. 4 ch. 49 § .045 (1971); State v. Tapia, 113 N.J. Super. 322, 330, 273 A.2d

Although the court conceded this long-settled principle, Pet. App. 7a, n.11, 600 F.2d at 1227 n.11, it substituted, essentially without explanation, its own view as to how the law should instead have developed: "We believe, however, that this principle should be limited to agents who, at the client's request, communicate *facts known to the client.*" *Id.* (emphasis in original). The cases draw no such distinction, and no considerations of policy support it. To the contrary, appropriate deference to the states' paramount interests in this area demands that the federal privilege be interpreted in accordance with the common law as it has consistently developed, and not as the court below might now prefer.[35] In accordance with that law, the court's criticism of the subject-matter test is without merit.

Finally, the court of appeals expressed concern that the subject-matter test might result in an "undue limitation of evidence," by placing upon adverse parties the burden of interrogating employees rather than obtaining relevant information from the corporation's attorneys. Pet. App. 6a, 600 F.2d at 1227. The court was evidently troubled by the possible costs of discovery, particularly where the corporation's agents are resident abroad. Of course, it is always more convenient

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769, 773 (1971); Davenport Co. v. Pennsylvania R.R., 166 Pa. 480, 485, 31 A. 245, 246 (1895); S.D. Code Tit. 19 ch. 13 § 2 (1979), Evidence Rule 502(b)(1).

[35] While Federal Rule of Evidence 501 may contemplate that in rare instances federal courts might deviate from the established principles of the common law by reference to that part of the rule which permits the common law to be tempered by "reason and experience," such a deviation would, at the very least, require an examination of what the common law is, and a careful consideration of those factors which militate against its application. The court below made no effort to perform such an analysis.

for an adverse party to obtain an attorney's notes of communications with his client rather than to discover the information himself, and to formulate his own legal theories and conclusions on the basis of what he has learned. The issue here is, however, scarcely reducible to mere convenience. The attorney's role is to advise and represent his client, and not to serve as an engine of discovery for a government agency or opposing litigant. Where an attorney's client is an individual, such a shortcut is impermissible even if the client is abroad or otherwise unavailable. No considerations of law or policy suggest that a different rule should obtain merely because the client is a corporation.[36]

Both the court of appeals and respondents have, in their concern for the particular features of this single case, disregarded the farreaching implications of a grudging interpretation of the privilege's protection. Although the Service could readily obtain all of the facts it requires through its ordinary investigative tools, *infra* at 55-58, it would undoubtedly find it convenient instead to obtain the privileged materials at issue here. By so doing, however, it would seriously inhibit corporate efforts to conform to numerous legal

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[36] The court's concern that, in this case, certain corporate employees are resident in foreign countries is a particularly inappropriate basis upon which to decide this important issue of general application. Indeed, the court's emphasis on the burdens of discovery indicates serious confusion between the absolute attorney-client privilege and the qualified work-product rule, where, under Fed. R. Civ. P. 26(b)(3), genuine need, not mere convenience, may be a factor to be considered in deciding whether to accord protection. We show below that, even with respect to the work-product rule, the Service has not made the requisite showing of hardship to warrant elimination of work-production protection. *Infra* at 58-63.

and regulatory policies. Moreover, if the privilege's protection is denied in this case, corporate counsel can be expected to take stringent precautions in future cases. Communications between counsel and corporate employees will become guarded and incomplete, and counsel's files will in later cases offer little of assistance to the Service or any other adversary. The momentary advantages to the Service in this single case will be far outweighed by long-term injuries to the public interest.

Finally, it is important that the rule to be announced in this case will not define the scope of the attorney-client privilege for corporate clients alone. The district courts can be expected also to apply the rule when privilege questions arise involving other large organizations which, like corporations, are hierarchically structured—such as, for example, government agencies, labor unions and associations. *Cf. Mead Data Control, Inc.* v. *United States Department of the Air Force,* 566 F.2d 242, 253 n.24 (D.C. Cir. 1977). Accordingly, the adverse effects of adoption of the control-group test would be felt throughout the public and private sectors of society.

**F. The Control-Group Test Is Inconsistent With Both the Purposes and the Effective Application of the Privilege.**

The control-group test would achieve none of the important objectives of the attorney-client privilege. To the contrary, adoption of such a test would frequently deny corporations the assistance of informed legal counsel and inhibit salutary efforts at corporate self-regulation. In addition, the test is necessarily so vague and imprecise that its application would be unpredictable.

**1. The Control-Group Test Denies Corporations the Assistance of Informed Counsel.**

Adoption of the control-group test would substantially inhibit meaningful communications between corporate counsel and subordinate corporate employees. Without the protection of the attorney-client privilege, both counsel and the employees would be compelled to assume that any communications between them would be available for discovery by a government agency or private adversary. The employee, who may be fearful of personal liability, embarrassment or other consequences, will be reluctant to speak candidly. His fears may be confirmed by the attorney, who is likely to feel constrained to warn the employee of the possible risks of candor. In addition, the attorney, who will be uncomfortably aware that any information he elicits might later be used against the corporation or the employee by an adversary, will be hesitant to probe deeply. He may feel compelled to base his advice on incomplete information or conjecture. Because the attorney will be unable to learn "all that relates to the client's reason for seeking representation," he will be unable to perform effectively the "professional mission" with which he was entrusted. *Trammel* v. *United States,* 100 S.Ct. at 913.

Adoption of the control-group test would adversely affect corporate counsel's performance of his professional responsibilities in other important respects. When an attorney speaks in confidence to a client, he can describe candidly the advantages and possible risks of a contemplated course of action. In contrast, "failure to afford such protection will induce guarded or perhaps misleading advice." Miller, 49 Va. L. Rev. at 269. Many legal questions have no certain answers, and

at times a client may decide, perhaps against counsel's advice, to undertake an action involving potential legal risks. If the matter is later the subject of litigation or government inquiry, the attorney must put aside his earlier misgivings and argue forcefully for vindication of the client's position. The attorney's effectiveness as an advocate is significantly reduced, however, if those earlier misgivings can be the subject of discovery by his adversary, *id.* at 269-70, or, worse still, if the attorney himself is compelled to become a witness to explain or justify his earlier advice.[37]

In such circumstances, an attorney may hesitate to advise strongly against any action which he suspects that his client might ultimately decide to adopt. In the case of corporate clients, he may refrain from offering any advice at all to subordinate employees, or offer only guarded or imprecise advice. "The resultant caution with which the lawyer advises his client may mislead the client into thinking his proposed action is lawful when in fact it is not, or may not be. It may induce him to undertake a program from which he would have been dissuaded had he been clearly warned of the legal dangers." *Id.* at 270. As a result, the corporate client would be effectively deprived of the full benefits of his attorney's legal counsel. In addition, by

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[37] As we show below, there has long been a strong public policy, endorsed by this Court, against the appearance of attorneys as witnesses in their clients' causes. *Infra* at 53. *See generally* Hickman v. Taylor, 329 U.S. at 513; American Bar Ass'n, *Code of Professional Responsibility,* Ethical Consideration 5-9. Moreover, an attorney who is required to appear as a witness may be disqualified from participation as counsel for a client, thus depriving that client of his choice of counsel. *See* Comden v. Superior Court, 20 Cal. 3d 906, 145 Cal. Rptr. 9, 576 P.2d 971, *cert. denied,* 439 U.S. 981 (1978).

adopting an action against which his lawyer has been unable to recommend forcefully, the client may provoke needless litigation or cause unwarranted injuries to the interests of others. Thus, the interests of both the client and society would often be threatened because the attorney was not free to speak candidly in giving his counsel.

**2. Adoption of the control-group test would inhibit voluntary corporate self-regulation.**

Corporate counsel are, with respect to many important government regulatory programs, the primary agents of law enforcement. By advice, admonition and encouragement, corporate counsel supplement the enforcement efforts of overburdened government agencies, and contribute to the success of regulatory programs that might otherwise prove administratively impossible. An essential role of corporate counsel is to encourage and assist those voluntary efforts.[38] Adoption of the control-group test would severely impede the self-policing upon which much governmental regulation depends.

Corporate managements will, if the protection of the privilege is narrowly constricted, be less likely even to initiate vigorous efforts to investigate possible problems. Corporate managers are understandably hesitant to commence internal inquiries, the fruits of which may include costly litigation, damage to the

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[38] *E.g.*, Burnham, 24 Bus. Law. at 913-14; Shenefield at 74; The Role of Inside Counsel in Corporate Accountability, Address by Harold M. Williams, Chairman of the Securities and Exchange Commission, before the Seventeenth Annual Corporate Counsel Institute (Oct. 9, 1979), *reprinted in* 196 Daily Report for Executives (BNA), October 9, 1979 at B-1.

corporation's business interests, and the exposure of corporate employees to embarrassment, liability or even physical danger.[39] *See, e.g., Dresser Industries, Inc.* v. *United States,* 596 F.2d 1231, 1234 (5th Cir. 1979), *cert. denied,* 100 S.Ct. 731 (1980); *SEC* v. *Lockheed Aircraft Corp.,* 404 F. Supp. 651, 652 (D.D.C. 1975). Under even the most favorable circumstances, management may believe that inquiries which threaten such consequences cannot serve the best interests of the corporation or its shareholders. If, in addition, counsel must warn management that communications made in connection with such inquiries cannot be held in confidence, but instead will be freely available to litigants and government agencies for use against the corporation, corporate managers may feel themselves compelled to assume a posture of "purposeful ignorance." Pet. App. 6a; 600 F.2d at 1227.[40]

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[39] The Third Circuit has dismissed this argument by suggesting that corporate managers have "little choice" whether to initiate internal inquiries because "the potential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential." In re Grand Jury Investigation (Sun Co.), 599 F.2d at 1237. Attorneys who deal with corporate clients on a daily basis disagree strongly with this conjecture. *See, e.g.,* Committee on the Federal Courts, New York County Lawyers Ass'n, Report on the Proposed Rules of Evidence, art. V, 7-8 (April 1970), *quoted in* 2 Weinstein & Berger, ¶ 503[01], at 503-12 n.1.

[40] The control group test has also been criticized for failing to recognize that an individual client acts both as a provider of information and as a decision-maker vis-a-vis the attorney. Limiting the corporate privilege to those individuals who are decision-makers ignores the necessity for the client to provide information to his attorney in confidence. *See, e.g.,* Note, 69 Mich. L. Rev. at 374.

The control-group test would also increase the unwillingness of subordinate corporate employees to cooperate with internal legal investigations. As we have observed above, counsel will be unable to assure such employees that their communications will be held in confidence. Aware that their statements may ultimately fall into the hands of an enforcement agency or opposing litigant, the employees may rightfully fear that cooperation will result in substantially enhanced risks of personal civil or criminal liability. *Corporate Crime,* 92 Harv. L. Rev. at 1259-76; Recent Decisions, *Corporations: Attorney-Client Privilege,* 47 Geo. Wash. L. Rev. 413, 424 n.81 (1979). Without the protection of the privilege, employees will be reluctant to answer questions relating to their compliance with legal and regulatory requirements.[41]

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[41] It has been suggested that affording the privilege to the corporation might not alleviate this concern because the employees would have no privilege of their own, and hence could not prevent the corporation from disclosing the information. *See, e.g.,* In re Grand Jury Investigation (Sun Co.), 599 F.2d at 1236; Jarvis, Inc. v. American Tel. & Tel. Co., 84 F.R.D. 286, 290, 292 (D. Colo. 1979). This argument ignores reality. A corporation has an interest in keeping open the channels of communication with its employees, and has good reason to keep information confidential which might be detrimental to an employee. If some employees suffer as a result of statements made to the corporation's attorneys, other employees will become reluctant to speak. Note, *The Attorney-Client Privilege: A Look at Its Effect on the Corporate Client and the Corporate Executive,* 55 Ind. L.J. 407, 408 (1980). Accordingly, it is not surprising that there are few cases where the corporation has waived the privilege vis-a-vis the employee. *Id.* at 408 & n.8.

Moreover, regardless of which test is applied to the privilege, the corporation must always speak through agents who may ultimately be jointly liable with the corporation. *See id.* at 409-11. The solution to this problem is not, as suggested by the Third Circuit, to narrow the corporation's privilege, but rather to broaden the employees' privilege in a manner consistent with these concerns. A proposal to that effect is set forth *id.* at 416-21.

Finally, adoption of the control-group test will impose other substantial constraints upon corporate counsel's efforts to assist corporate self-regulation. When it may reasonably be anticipated that the privilege will be available—as it was expected to be in this case—the attorney's principal concerns are accuracy and completeness. His purpose is to determine the relevant facts so that he may reliably advise the client whether wrongdoing has occurred or is threatened, and whether steps should be taken to mitigate or correct the situation. If, however, the attorney is aware that the information he receives in the course of his duties may become publicly available—and may perhaps fall into the hands of an adversary who will seek to exploit it to the detriment of his client—his concerns may become quite different. For "fear of what may eventually be released to the other side," [42] he will be obliged to remain constantly on guard to create a favorable record and thereby to minimize the potential harm to his client's interests.

**3. The Control-Group Test Is Uncertain and Unpredictable in Its Application.**

A privilege, if it is effectively to serve the policies for which it is intended, must be applied in a uniform and predictable fashion. If it is not, neither counsel nor clients can rely upon its protection, and it cannot encourage the communications it was designed to promote. *Fisher* v. *United States,* 425 U.S. at 403; *United States* v. *Buckley,* 586 F.2d 498, 502-03 (5th Cir. 1978),

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[42] Comment, *The Privileged Few: The Attorney-Client Privilege As Applied to Corporations,* 20 U.C.L.A. L. Rev. 288, 301 (1972). *See also* Block & Barton, 35 Bus. Law. at 6.

*cert. denied,* 440 U.S. 982 (1979). *See also* 2 Weinstein & Berger, ¶ 503(b)[04], at 503-44.

The control-group test articulated by the court of appeals plainly does not satisfy this important requirement. The court defined the "control group" as "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given." Pet. App. 5a, 600 F.2d at 1226.[43] Such a definition suggests more questions than it resolves, and effectively guarantees that the scope of application of the privilege will remain uncertain and unpredictable. For example, what constitutes a "substantial role" in "deciding and directing" the corporation's response to legal advice? What, if any, difference is there between "deciding" on a response and "directing" it? If the control group "usually" consists of "top" managers, what are the exceptions? What managers are "top?" When dealing with a wholly or partially controlled subsidiary, is the relevant control group that of the parent corporation or that of the subsidiary?

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[43] The definition offered by Judge Kirkpatrick when he first announced the control-group test was different at least in form. He permitted the application of the privilege only if:

> the employee making the communication, of whatever rank he may be, is in a position to control or even take a substantial part in a decision about any action which the corporation may take upon the advice of an attorney, or if he is an authorized member of a body or group which has that authority.

City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. at 485. The questions raised by, and the ambiguities implicit in, that definition, although different in part from those of the definition adopted below, are no less serious and fundamental.

The ambiguity of the court's definition is not the result of any lack of care. It reflects instead the vagueness of the control group concept and its unworkability in the context of the modern corporation—particularly a large, multinational corporation with different areas of responsibility diffused among many individuals at various levels in the corporate structure. It is undoubtedly true that central corporate managers have ultimate responsibility for establishing corporate policy in light of counsel's advice, but many aspects of the development and implementation of policy are commonly left largely in the hands of middle and lower-echelon managers. *Supra* at 16-18. In any particular case, responsibility for a decision may be shared among many different levels and elements of the corporate structure, with the discretion afforded to each of them varying significantly with the issue in question and the size and structure of the corporation.[44] In these circumstances, corporate counsel will often be unable to predict who ultimately might be held to have taken a sufficiently "substantial part" in a decisionmaking process for inclusion in the "control group."

The cases which have applied the control-group test illustrate vividly both the test's ambiguities and its dependence upon detailed factual findings peculiar to each specific case. For example, in *Hogan* v. *Zletz,* 43 F.R.D. 308, 315-16 (N.D. Okla. 1967), *aff'd in part sub nom. Natta* v. *Hogan,* 392 F.2d 686 (10th Cir. 1968), the court held that numerous corporate employees were members of the control group, including not only the managers and assistant managers of the company's

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[44] *E.g.,* Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege,* 12 B.C. Indus. & Com. L. Rev. 873, 876 (1971).

patent division and research and development department, but also all of the members of the company's patent committee. In *Garrison* v. *General Motors Corp.,* 213 F. Supp. 515, 518 (S.D. Cal. 1963), the court held that all officers, directors and department heads, as well as a department head's assistant and the chief engineer, were in the control group. On the other hand, the court excluded a senior project manager and the assistant chief engineer. *See also, Herbert* v. *Lando,* 73 F.R.D. 387, 397-400 (S.D.N.Y.) (network vice president and executive producer of new program both held within control group), *remanded on other grounds,* 568 F.2d 974 (2d Cir. 1977), *rev'd on other grounds,* 441 U.S. 153 (1979).

Other district courts purporting to apply the same test have reached strikingly different results. In *Congoleum Industries, Inc.* v. *GAF Corp.,* 49 F.R.D. 82, 82-85 (E.D. Pa. 1969), *aff'd,* 478 F.2d 1398 (3d Cir. 1973), the court found that only the divisional and corporate vice presidents were entitled to control-group status, and excluded two directors of research and one vice president for production and research. In *Duplan Corp.* v. *Deering Milliken Inc.,* 397 F. Supp. 1146, 1165-67 (D.S.C. 1974), *aff'd on other grounds,* 540 F.2d 1215 (4th Cir. 1976), the court, applying an amalgamation of tests, limited the control group to the highest officers and directors, excluding such senior members of management as vice-presidents and directors of research.

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Adoption by this Court of the subject-matter test will encourage candid communications between counsel and all corporate employees with information relevant to the professional responsibilities counsel has been

assigned to perform, and thus assure corporations the opportunity, similar to that now guaranteed individuals, to obtain informed legal assistance. In addition, it will facilitate the voluntary efforts of corporations to conform their conduct to legal and regulatory requirements. Such a test will also accord with well-settled state policies and provide both courts and corporate counsel with a relatively simple and objective standard for application of the privilege. In contrast, the control-group test would deny corporations informed legal assistance, inhibit corporate self-regulation, and introduce uncertainty and unpredictability in the privilege's application.

## II.

### THE WORK-PRODUCT RULE IS APPLICABLE HERE AND PROTECTS FROM DISCLOSURE THE MATERIALS PREPARED BY AND FOR COUNSEL IN CONTEMPLATION OF LITIGATION

The second question presented is whether the lawyers' interview notes and the questionnaire responses demanded by the summons are protected against compulsory disclosure under *Hickman* v. *Taylor,* 329 U.S. 495 (1947), and Fed. R. Civ. P. 26(b)(3). The court of appeals did not hold that these materials do not constitute attorney work-product. Nor did it consider whether work-product protection was overriden by any showing of necessity. Instead, in a terse footnote, it declared that attorney work-product materials are entitled to no protection in responding to a summons issued by the Service under 26 U.S.C. § 7602.[45]

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[45] Unlike its ruling on attorney-client privilege, discussed above, the court's holding as to the work-product rule applies to individual taxpayers as well as to corporations.

A.

**Neither the Statutes Authorizing nor the Policies Served by Issuance of a Summons Warrants Denial of Work-Product Protection.**

The question presented is ultimately one of statutory interpretation:[46] Whether, despite the important public policies served by the work-product rule, Congress intended that the rule's protection should not be applicable to summonses issued by the Service. At the outset, it is significant that nothing in the language of Section 7602, or any other provision of the Internal Revenue Code, suggests that the work-product rule might not be applicable to such summonses. Section 7602 and the ancillary sections that govern enforcement of summonses are entirely silent on the matter.[47] Nothing in the legislative history of those sections suggests that Congress ever supposed that it might be eliminating the protections afforded by the work-product rule.[48] Nor does Federal Rule of Civil Procedure

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[46] *See* Donaldson v. United States, 400 U.S. 517, 522 (1971); United States v. Euge, 100 S.Ct. 874, 877-78 (1980). It should be observed, however, that important constitutionally-protected interests may indirectly be implicated by any decision here, including privacy and the effective assistance of counsel. *See infra* at n.48, 57 nn. 68 & 69; Fisher v. United States, 425 U.S. at 414-15 (Brennan, J., concurring); Dalia v. United States, 441 U.S. 238, 263 (1979) (Stevens, J., dissenting). These substantial constitutional interests serve to magnify the importance of the longstanding policies the rule is designed to serve. *Infra* at 49-55.

[47] The Service's basic authority to issue such summonses is contained in Section 7602, but other provisions of Subchapter A of Chapter 78 of Title 26 govern such ancillary matters as enforcement, time and place of examination, service and third-party summonses. None of those provisions purports to restrict in any way the application of the work-product rule.

[48] Congress amended the Service's summons authority in 1954, several years after the decision in *Hickman* v. *Taylor*, but it did

81(a)(3), which renders those rules applicable to summons enforcement proceedings, purport to limit in any way the relevance of the work-product principle embodied in Rule 26(b)(3).[49]

Nor has this Court ever suggested that the work-product rule is irrelevant to a summons issued under Section 7602. To the contrary, the Court appeared to assume in at least two cases that the rule is applicable to such summonses. In *Reisman* v. *Caplin,* 375 U.S. 440 (1964), a taxpayer's attorney sought to prevent an accountant from producing materials prepared under the attorney's direction. This Court denied declaratory and injunctive relief, on the ground that there was an adequate remedy at law. It emphasized that an action in the district court to enforce the summons would afford "complete protection," *id.* at 446, and made clear that "any appropriate ground" may be asserted in such an action to defeat a summons. *Id.* at

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not intend to change the scope or interpretation of that authority. H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), *reprinted in* [1954] U.S. Code Cong. & Ad. News 4017; S. Rep. No. 1622, 83d Cong., 2d Sess. (1954), *reprinted in* [1954] U.S. Code Cong. & Ad. News 4621. *See also* United States v. Euge, 100 S.Ct. at 881 n.12. In subsequent amendments to related provisions, Congress has shown a strong concern to prevent infringements by the Service of taxpayers' privacy interests. H.R. Rep. No. 94-658, 94th Cong, 2d Sess. 307 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 2897, 3203; United States v. Exxon Co., U.S.A., 450 F. Supp. 472, 476 (D. Md. 1978). Such concern is scarcely consistent with any intention to abolish entirely the protection of the work-product rule in connection with Section 7602.

[49] Although the specific provisions of the Federal Rules may not inflexibly apply in summons enforcement proceedings, Donaldson v. United States, 400 U.S. at 528, Rule 81 provides in substance that those rules, including the work-product provisions of Rule 26(b)(3), should apply, absent good reasons to the contrary.

449. Although the Court did not specifically list the work-product rule as such a ground,[50] it would have been an empty gesture to remit the parties to an action in the district court if the work-product materials which were the action's principal subject could under no circumstances be protected.

Similarly, the Court appeared to assume in *Donaldson* v. *United States,* 400 U.S. 517 (1971), that the work-product rule would be applicable in an action to enforce an IRS summons. In assessing a taxpayer's claim to intervene as of right in a proceeding to enforce a third-party summons, the Court carefully emphasized that the documents in question were "routine" business records and not his attorney's work product. *Id.* at 530. On this basis, it held that the taxpayer did not have the requisite interest to intervene as of right. By implication, a taxpayer would have the requisite interest in documents that were the work product of his attorney, and presumably would be entitled to intervene precisely in order to enforce the protection of the work-product rule.[51]

Prior to the decision of the court below, the only suggestion that the work-product rule might not apply to a summons issued under Section 7602 was made in *United States* v. *McKay,* 372 F.2d 174, 176 (5th Cir. 1967). Even there, the court did not hold the rule inapplicable; instead, it merely expressed doubt based

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[50] It did, however, identify the closely-related attorney-client privilege as one such ground. 375 U.S. at 449.

[51] More recently, partly in an effort to buttress taxpayers' privacy rights against needless infringement by the Service, Congress has created statutory rights of intervention in proceedings to enforce certain third-party summonses issued by the Service. *Supra* at 45 n.48; *infra* at 57 n.68.

on the belief that the Service's investigations are analogous to grand jury proceedings, and that the rule is inapplicable to such proceedings.[52] Since that expression of uncertainty in 1967, there have been significant developments. First, in a series of cases it has been held that the work-product rule is applicable in grand jury proceedings.[53] To the extent that the Service's investigatory powers are analogous to the inquisitorial powers of a grand jury,[54] the analogy now demands reversal of the court of appeals' conclusion. Second, at least four courts have rejected the expression of doubt in *McKay*. *United States* v. *Brown*, 478 F.2d 1038, 1041 (7th Cir. 1973); *United States* v. *Amerada Hess Corp.*, 1980-1 U.S. Tax Cas. (CCH) ¶ 9160, at 83,177 (3d Cir. 1980); *United States* v. *Lipshy*, 1979-2

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[52] The uncertainty expressed in *McKay* was mentioned in passing in United States v. Cote, 326 F. Supp. 444, 450 (D. Minn. 1971), *aff'd on other grounds*, 456 F.2d 142 (8th Cir. 1972). The issue was not considered by the court of appeals in *Cote*.

[53] In re Grand Jury Investigation (Sun Co.), 599 F.2d at 1229; In re Grand Jury Subpoena Dated December 19, 1978, 599 F.2d 504, 509 (2d Cir. 1979); Velsicol Chemical Corp. v. Parsons, 561 F.2d 671, 676 (7th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 842 (8th Cir. 1973); In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 946-47 (E.D. Pa. 1976); Matter of Rosenbaum, 401 F. Supp. 807, 808 (S.D.N.Y. 1975); United States v. Mitchell, 372 F. Supp. 1239, 1245 (S.D.N.Y. 1973), *appeal dismissed sub nom.* Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973); In re Terkeltoub, 256 F. Supp. 683, 685 (S.D.N.Y. 1966). *See also* United States v. Nobles, 422 U.S. 225, 247 n.6 (1975) (White, J., concurring).

[54] The Government accepted them as analogous for purposes of its brief in this case before the court of appeals. At 28. *See also* United States v. Powell, 379 U.S. 48, 57 (1964); United States v. Bisceglia, 420 U.S. 141, 147-48 (1975); United States v. Amerada Hess Corp., 1980-1 U.S. Tax Cas. (CCH) ¶ 9160 (3d Cir. 1980).

U.S. Tax Cas. (CCH) ¶ 9628, at 88,280 (N.D. Tex. 1979); *Groh* v. *Decker,* 1972-1 U.S. Tax Cas. (CCH) ¶ 9410, at 84,410 (W.D. Mich. 1971), *appeal vacated and case remanded,* 1973-1 U.S. Tax Cas. (CCH) ¶ 9401 (6th Cir. 1973).

In short, the court of appeals' unexplained conclusion stands virtually alone. Nothing in the language or history of the statute justifies such a result. Apart from one tentative dictum, now superseded by subsequent events, nothing in the cases supports it. Four courts have unequivocally rejected it, and at least two decisions of this Court appear inconsistent with it.

**1. The Important Public Policies Served by the Work-Product Rule Apply to a Service Summons.**

In *Hickman* v. *Taylor,* 329 U.S. 495 (1947), this Court emphasized that the protection of attorney work product against compulsory disclosure is "essential" for the vindication of important public policies, particularly the "public policy underlying the orderly prosecution and defense of legal claims." *Id.* at 510. More important, it recognized that without suitable work-product protection both clients and the cause of justice "would be poorly served." *Id.*[55]

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[55] The Court identified several reasons why the protection of attorneys' work-product is "essential." Adequate preparation for possible litigation demands that lawyers be afforded privacy to assemble all of the pertinent facts, sift relevant from irrelevant information, and formulate legal theories and strategies. 329 U.S. at 511. Without such privacy, much that is now written would be left unrecorded, and an attorney's thoughts, "heretofore inviolate, would not be his own." *Id.* The Court feared that the disclosure of work-product materials would stimulate "[i]nefficiency, unfairness and sharp practices." *Id.*

The Court foresaw especially severe problems if an attorney's notes regarding oral statements made to him by potential witnesses, such as the attorneys' interview notes at issue here, were subject to disclosure. The difficulties which would be caused by compulsory production of such materials are so great, and the corresponding interest in privacy so strong, that "[n]o legitimate purpose" could be served by their disclosure. *Id.* at 512-13. Even apart from the "grave dangers of inaccuracy and untrustworthiness" that would be created, the availability of such materials would make the attorney "much less an officer of the court and much more an ordinary witness." *Id.* at 513. Lawyers would frequently be compelled to testify in their clients' causes, and the "standards of the profession would thereby suffer." *Id.* At least in the situation before it, the Court was unable to imagine any possible showing of necessity that could ever justify the disclosure of such materials. *Id.* at 512.[56]

The decision in *Hickman* v. *Taylor* is sometimes regarded as the origin of the work-product rule, but in fact the policies served by the rule were recognized substantially earlier. Well before *Hickman,* both American and English courts held that attorneys' notes and other materials prepared in anticipation of possible litigation generally were not subject to disclosure. 4 Moore, *Federal Practice* ¶¶ 26.63[2], [3] (2d ed. 1979). They did so for several interrelated reasons: For example, such materials were not considered evidence; parties were not thought to be entitled to pry

[56] Thirty years later, Mr. Justice White, joined by Mr. Justice Rehnquist, observed that such mental impressions are "almost never evidence" and that out-of-court statements are generally inadmissible hearsay. United States v. Nobles, 422 U.S. at 245 n.4 (White, J., concurring).

into their opponents' strategies and preparations for litigation; or the materials were thought to be encompassed by the attorney-client privilege. *Id.; Hickman* v. *Taylor,* 329 U.S. at 510 n.9; *United States* v. *Nobles,* 422 U.S. at 243 n.2 (White, J., concurring). In short, the work-product rule reflects a long-standing policy on both sides of the Atlantic that, to assure the orderly and effective operation of the adversary system, attorneys' work product should be protected.

Almost thirty years after *Hickman,* the Court reaffirmed the urgency of the public policies served by the work-product rule. In *United States* v. *Nobles,* the Court held that the rule applies to criminal as well as civil litigation. 422 U.S. at 236. In so doing, the Court emphasized that the rule performs a "vital" role in all litigation, to "assure the thorough preparation and presentation of each side of the case." *Id.* at 238 (footnote omitted). The Court stated that the rule is "intensely practical," grounded in the "realities of litigation in our adversary system." *Id.* The "strong" policies served by the rule, *id.* at 236-37, are ultimately rooted in society's interest in the fair and effective operation of our system of justice. *Id.* at 238.

The importance of the public policies served by the work-product rule is illustrated vividly by this case. If it had been clear that work-product materials would be available for scrutiny by the Service, counsel for Upjohn would likely have conducted their voluntary investigation of questionable foreign payments quite differently. For example, counsel might have limited the number of employees they elected to interview; they might have conducted interviews but not prepared notes of their impressions and conclusions; or they might have made only selective notes, in which they did not record information or impressions that might

later be construed as harmful to Upjohn or its employees.

If any of these expedients had been adopted by Upjohn's lawyers, the public interest plainly would not have been served. Upjohn itself would have enjoyed substantially less adequate preparation for anticipated litigation. More important, the regulatory policies adopted by the Securities and Exchange Commission and other agencies with respect to questionable foreign practices might have been less effectively enforced. Upjohn and numerous other companies would have been discouraged from voluntary programs of self-regulation which are essential for effective implementation of those policies.[57] Investors and the public might have received less complete information. Precisely as this Court predicted, the result would have been "demoralizing" to the lawyers, and, far more important, a serious disservice to their clients and the cause of justice. *Hickman* v. *Taylor*, 329 U.S. at 511.

In addition, if any of the issues foreseen by Mr. Thomas ripens into litigation, whether with the Service

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[57] *See, e.g.*, The Role of Inside Counsel in Corporate Accountability, Address by Harold M. Williams, Chairman of the Securities and Exchange Commission, before the Seventeenth Annual Corporate Counsel Institute (Oct. 9, 1979), *reprinted in* 196 Daily Report for Executives (BNA), October 9, 1979, at B-1; Corporate Accountability, Address by Harold M. Williams, Chairman of the Securities and Exchange Commission, before the Fifth Annual Securities Regulation Institute (Jan. 18, 1978), *summary in* 12 Daily Report for Executives (BNA), January 18, 1978, at A-13; Address by Stanley Sporkin, Securities and Exchange Commission, before the Stamford, Conn. Area Commerce and Industry Ass'n (Mar. 15, 1977). *See also* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. at 1164; Lorne, *The Corporate and Securities Adviser, The Public Interest and Professional Ethics*, 76 Mich. L. Rev. 423 (1978).

or with others, Upjohn's attorneys may, if their interview notes are disclosed, be compelled to testify in support or explanation of those notes. Such a result would violate the long-standing policy against lawyers serving as witnesses in their clients' causes. Counsel would be placed in the "unseemly and ineffective position" of arguing their own credibility.[58] *See id.* at 513; *United States* v. *Nobles,* 422 U.S. at 252-53 (White, J., concurring). Precisely as this Court feared, "[t]he standards of the profession would thereby suffer." *Hickman* v. *Taylor,* 329 U.S. at 513.

The strength of the policies served by the work-product rule is confirmed by the rule's unquestioned application in closely related situations. If, for example, the Department of Justice were to continue this investigation on behalf of the Service through a grand jury, the work-product rule would be applicable.[59] Alternatively, if the Department of Justice were to initiate civil or criminal litigation against Upjohn on behalf of the Service in the district courts, the Federal Rules of Civil or Criminal Procedure would govern, and the work product of Upjohn's counsel would be assured a substantial measure of protection. Fed. R. Civ. P. 26(b)(3); Fed. R. Crim. P. 16(b)(2).

The Service seeks here far greater rights to seize materials under Section 7602 than are available through

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[58] Ethical Consideration 5-9 of the American Bar Association's Code of Professional Responsibility (1978) provides in relevant part that:

> An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

[59] *Supra* at 48 & n.53.

a grand jury's inquisitorial powers or during civil or criminal litigation. There is no policy or other justification for such disparate results. Moreover, such an anomaly would encourage the Service to avoid the limitations that have been imposed on civil and criminal discovery by extending its investigations beyond the time that a decision to litigate is appropriate. This Court has already warned against such efforts in a related context. *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).[60]

The rejection of work-product protection in connection with summonses issued under Section 7602 would have serious adverse consequences extending far beyond the timing of the Service's prosecutorial recommendations. The Service's authority under Section 7602 has been described by this Court as analogous to the summons authority of other federal agencies, *United States* v. *Powell*, 379 U.S. at 57; *United States* v. *Bisceglia*, 420 U.S. at 147-48, and it must be anticipated that any decision here would be applied to summonses issued by other agencies. In addition, virtually any controversy may ultimately have federal tax consequences, or consequences under a federal regulatory statute containing analogous summons provisions.[61] As a result, rejection of the work-product rule will compel counsel in a broad range of disputes, many of which will not be initially or primarily tax-related, to pre-

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[60] "We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for prosecution." 437 U.S. at 316-17.

[61] As Mr. Justice Stewart has observed, "[o]ur economy is 'tax relevant' in almost every detail." United States v. Bisceglia, 420 U.S. at 154 (Stewart, J., dissenting).

pare for anticipated litigation on the basis that at some stage of the controversy their work product may be denied protection.

The important policies served by the work-product rule readily explain why nothing in the statute or its legislative history intimates any intention by Congress to prevent the rule's application to a summons issued under Section 7602. Such summonses are issued in support of investigations that may easily terminate in civil or criminal litigation, and tax-related litigation cannot meaningfully be distinguished for this purpose from other anticipated litigation. The same "strong" policy favoring the orderly prosecution and defense of claims is applicable,[62] the same risks of "unfairness" and "sharp practices" would arise from rejection of work-product protection,[63] and the same "realities of litigation" exist.[64]

**2. The Service Has Adequate Investigatory Methods for the Performance of Its Responsibilities Without Access to Work-Product Materials.**

It cannot persuasively be argued that access to attorneys' work product is "necessary"[65] for the Service's performance of its responsibilities for the enforcement and administration of the federal tax laws. To the contrary, Congress has provided the Service with broad powers that are entirely adequate to obtain any pertinent information it may require. Section 7602

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[62] United States v. Nobles, 422 U.S. at 236-37.

[63] Hickman v. Taylor, 329 U.S. at 511.

[64] United States v. Nobles, 422 U.S. at 238.

[65] United States v. Euge, 100 S.Ct. at 878.

authorizes the Secretary of the Treasury, or his delegate, for

> the purpose of ascertaining the correctness of any return . . . determining the liability of any person for any internal revenue tax . . . or collecting any such liability . . . [t]o summon the person liable for tax . . . or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . or any other person the Secretary may deem proper, to appear . . . and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . .

Such summonses may be addressed to third-party witnesses, as well as the taxpayer and his agents.[66] If a witness refuses to appear or testify, the Service may obtain prompt enforcement of the summons in the district courts. 26 U.S.C. §§ 7402(b), 7604.[67] Other provisions of the Internal Revenue Code compel taxpayers to maintain such books and records as may be necessary for the Service to determine tax liability. For example, 26 U.S.C. § 964(c) and its accompanying regulations require a taxpayer, such as Upjohn, which is a shareholder of controlled foreign corporations, such as several of Upjohn's subsidiaries involved in the Service's investigation, to maintain (and even to translate into English) such records and accounts regarding controlled foreign corporations as the Service may prescribe. These and other statutory provisions assure

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[66] *See, e.g.*, United States v. Bisceglia, 420 U.S. at 148-50. *See also* 26 U.S.C. § 7609.

[67] Failure to appear or produce records also may be punished, in appropriate circumstances, by fine or imprisonment. 26 U.S.C. §§ 7210, 7604(b). *See* Reisman v. Caplin, 375 U.S. at 446-49.

the Service access to a broad range of relevant documents and information.

In addition, the courts have acted vigorously to assure the effectiveness of the investigatory powers granted by Congress. This Court has held that a taxpayer may not collaterally attack a summons, *Reisman* v. *Caplin,* 375 U.S. at 448-49, and that he may not intervene as of right in an action to enforce a summons against a third party. *Donaldson* v. *United States,* 400 U.S. at 527-30.[68] The Service need not show probable cause to believe that fraud has been committed in order to conduct a second examination of a taxpayer's books, notwithstanding the limiting provisions of 26 U.S.C. § 7605(b), *United States* v. *Powell,* 379 U.S. at 52-57, and the Service may use its summons power in aid of criminal as well as civil tax investigations, so long as no recommendation to the Department of Justice for criminal prosecution has been made. *United States* v. *LaSalle National Bank,* 437 U.S. at 318. The Court has sustained the validity of John Doe summonses, *United States* v. *Bisceglia,* 420 U.S. at 148-50,[69] and only this year the Court upheld the

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[68] The result in *Donaldson* was modified by Congress in 1976 by the addition to the Code of 26 U.S.C. § 7609, which provides taxpayers certain rights of notice and intervention in connection with third-party summonses. In so doing, Congress emphasized its concern regarding undue invasions of privacy by the Service. *E.g.*, H.R. Rep. No. 94-658, *supra*, at 307. *See generally* Kenderdine, *The Internal Revenue Service Summons to Produce Documents: Powers, Procedures, and Taxpayer Defenses,* 64 Minn. L. Rev. 73, 81-85 (1979).

[69] Such John Doe summonses are now, however, the subject of modified requirements generally set forth in 26 U.S.C. § 7609(f). An important reason for Congress' addition of these provisions in 1976 was its concern regarding needless invasions of privacy interests. *See* materials cited in note 68, *supra.*

Service's right to require a taxpayer to execute handwriting exemplars. *United States* v. *Euge,* 100 S.Ct. at 877.

The formidable armory of investigatory weapons given to the Service by Congress, and vigorously enforced by this and other courts, leaves no room for any persuasive claim that it is also "necessary"[70] for the Service to be afforded access to the work product of Upjohn's counsel. In this case, for example, we show that the Service had access, or could readily have obtained access, to all of the testimony and documentary materials that it could conceivably have required for its investigation. There was no need for it instead to seek to ride piggyback on the materials prepared by or for Upjohn's counsel in contemplation of possible litigation. In Justice Jackson's words, the Service should not perform its functions on "wits borrowed from the adversary." *Hickman* v. *Taylor,* 329 U.S. at 516 (Jackson, J., concurring).

**B.**

**Work-Product Protection Was Not Overcome in This Case by Any Showing of Necessity.**

It is not contested that the interview notes[71] and questionnaire responses sought by the summons con-

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[70] United States v. Euge, 100 S.Ct. at 878.

[71] At the hearing before the Magistrate, Mr. Thomas described the contents of his notes in the following terms:

> My notes would contain what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things

stitute the work product of Upjohn's counsel. Precisely as *Hickman* v. *Taylor* provided, and Rule 26(b)(3) now requires, all of the materials were prepared by or for counsel "in anticipation of litigation." From the outset, Mr. Thomas recognized that questionable foreign payments give rise to a wide variety of legal problems, any or all of which may stimulate litigation.[72] His fears were by no means groundless. Such payments have frequently led to civil or criminal litigation.[73] Indeed, the Third Circuit has emphasized that in such

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that I needed to find elsewhere. They were more than just a verbatim report of my conversation with the—a report of my conversation in the interviews.

App. 93a.

[72] Among other matters, Mr. Thomas was concerned about possible litigation involving compliance with the securities laws, currency restrictions, federal tax laws or the laws of various foreign jurisdictions. *See, e.g.*, App. 123a-124a.

[73] *See, e.g.*, Abbey v. Control Data Corp., 603 F.2d 724 (8th Cir. 1979), *cert. denied*, 100 S.Ct. 670 (1980); SEC v. Lockheed Aircraft Corp., [1976] Fed. Sec. L. Rep. (CCH) ¶ 95,509 (D.D.C. 1976); Gall v. Exxon Corp., 418 F. Supp. 508 (S.D.N.Y. 1976); SEC v. International Telephone & Telegraph Corp., [1979] Fed. Sec. L. Rep. (CCH) ¶ 96,948 (D.D.C. 1979); Rosengarten v. International Telephone & Telegraph Corp., 466 F. Supp. 817 (S.D.N.Y. 1979); SEC v. International Systems & Controls Corp., [1979] Fed. Sec. L. Rep. (CCH) ¶ 96,922 (D.D.C. 1979).

In this case, after the decision of the court of appeals, petitioners were informed by letter dated September 17, 1979, that the Service had made a recommendation to the Department of Justice regarding a criminal prosecution. The nature of that recommendation and the circumstances which led to it are not part of the record before this Court. The Solicitor General and petitioners agree that any contentions as to the impact of that recommendation upon the summons challenged in this case, including any based upon the decision of this Court in United States v. LaSalle National Bank, 437 U.S. 298 (1978), may be considered by, and should appropriately be addressed initially to, the district court in connection with any remand of the case by this Court.

situations litigation is "almost inevitable." *In re Grand Jury Investigation (Sun Co.),* 599 F.2d at 1229. *See also In re Grand Jury Subpoena Dated December 19, 1978,* 599 F.2d at 511. The interview notes and questionnaire responses at issue here were parts of Mr. Thomas' efforts to prepare for such anticipated litigation.

Notes and memoranda prepared by attorneys in connection with their interviews of potential witnesses have repeatedly been held to constitute work product. *E.g., Hickman* v. *Taylor,* 329 U.S. at 512-13; *International Business Machines Corp.* v. *Edelstein,* 526 F.2d 37, 41 (2d Cir. 1975); *In re Grand Jury Proceedings (Duffy),* 473 F.2d at 848. In fact, such materials have, to the extent that they reflect an attorney's "mental impressions, conclusions, opinions, or legal theories," consistently been afforded absolute immunity from disclosure. Fed. R. Civ. P. 26(b)(3);[74] *Hickman* v. *Taylor,* 329 U.S. at 512-13. At least since *Hickman,* courts have recognized that the disclosure of such materials would create special risks of inaccuracy and sharp practices, as well as compelling lawyers frequently to testify in their clients' causes. *See also United States* v. *Leggett & Platt, Inc.,* 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz,* 509 F.2d 730, 735-36 (4th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975).

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[74] Although Rule 26(b)(3) permits the disclosure of various trial preparation materials upon a suitable showing of need and hardship, it unequivocally instructs the district courts to "protect against disclosure" materials containing "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative . . . ."

The second category of materials demanded by the summons, the responses to the confidential questionnaire prepared by Upjohn's attorneys, also constitute counsel's work product. *See, e.g., United States* v. *American Optical Co.,* 37 F.R.D. 233, 236-37 (E.D. Wis. 1965); *United States* v. *Aluminum Co. of America,* 34 F.R.D. 241, 243 (E.D. Mo. 1963), *aff'd per curiam on other grounds,* 382 U.S. 12 (1965).

The court of appeals did not consider whether the protection of the work-product rule was overcome in this case by any showing of necessity. Although the district court concluded, on the basis of the Magistrate's recommendation, that such a showing had been made, that conclusion is clearly erroneous. The Service had available to it a formidable arsenal of methods, which together were entirely adequate for purposes of its investigation. If the Service wished additional information, it had only to utilize those methods in accordance with Congress' intentions; there was no need instead to resort to the work product of Upjohn's counsel.

The Magistrate's recommendation was based largely upon Upjohn's objection, on grounds of relevancy, to questions regarding payments which could not conceivably have affected its United States tax liability. App. 190a-91a. That recommendation is, however, largely undermined by the fact that the Service itself sustained petitioners' position on this point in a ruling issued during the course of the investigation.[75] In any case, the appropriate method for the Service to adopt in challenging Upjohn's objections would have been to issue summonses for the witness' testimony, and there-

[75] Revenue Ruling 77-442, 1977-2 C.B. 264.

after to petition the district court for enforcement. The Service's failure to adhere to a direct method of resolving the relevancy issue, coupled with its subsequent acceptance of the position taken by petitioners, completely undercuts the Magistrate's conclusion, adopted by the district court, that the work-product privilege had been overcome by a showing of necessity.

In considering the Service's need for the work-product materials, account must be taken of the very extensive information to which the Service had access. In response to some 275 Information Document Requests, Upjohn furnished the Service with numerous documents and records from its files and those of its branches and subsidiaries relating to the questionable payments discovered in the internal investigation conducted by Upjohn's counsel and voluntarily reported to the Service. Without the necessity of any summons, special agents interrogated in this country or abroad at least 25 senior officials of Upjohn or its subsidiaries, in some instances on more than one occasion.[16] The Service was assured that Upjohn would make available all of the persons who responded to the questionnaire or who were interviewed by its counsel, as well as any other Upjohn employees selected by the Service. With respect to persons resident outside the United States, Upjohn agreed to give notice to the Service when those persons visited the United States.

Additional documents and records were easily obtainable through further information documents requests, by summons or pursuant to the Service's rights

[16] At the time of the hearing before the Magistrate, some 25 officials had been interrogated by the Service. App. 76a. Additional numbers were interrogated by the Service after the hearing.

of inspection. Additional interviews were available upon request or, if the Service preferred, by summons. Certain of the interviews might have required travel abroad, but a special agent made one visit for this purpose to Japan and Hong Kong, and the Service might easily have arranged similar trips elsewhere.[77] Alternatively, the Service might simply have elected to interrogate those stationed overseas when they returned to the United States.

The only "hardship" with which the Service was confronted was the need to utilize the discovery tools provided by Congress. In these circumstances, it cannot be persuasively argued that the Service has "substantial need of the materials" and cannot "without undue hardship . . . obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3).

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[77] It would not even have been essential for a special agent to travel outside the United States. The Service maintains representatives in some 14 foreign cities, carefully located to provide convenient coverage to all parts of the world. [1979] Commissioner of Internal Revenue, Ann. Rep. 23 (1980). Among other things, the representatives assist "in the overseas examination of multinational corporations." *Id.* The representatives could presumably have been instructed to interview some or all of the witnesses resident abroad.

It is significant that claims of hardship based on distance have been rejected in cases involving grand jury investigations in which no reasonable effort was made to secure the testimony of witnesses overseas. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d at 1232-33; *In re* Grand Jury Subpoena Dated December 19, 1978, 599 F.2d at 512-13.

## CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded with instructions to deny enforcement of the challenged summons to the extent that it calls for documents that are privileged under the subject-matter test or constitute the work-product of Upjohn's lawyers.

Respectfully submitted,

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# APPENDIX

## APPENDIX

### Internal Revenue Code of 1954 (26 U.S.C.)

Section 7402. Jurisdiction of District Courts

(a) *To issue orders, processes, and judgments*

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica,* orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To enforce summons*

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) *For damages to United States officers or employees*

Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

[(d) *Repealed. Pub. L. 92-310, title II, § 230(d), June 6, 1972, 86 Stat. 209*]

(e) *To quiet title*

The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) *General jurisdiction*

For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of title 28 of the United States Code.

Section 7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give

such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7604. Enforcement of summons.

(a) *Jurisdiction of district court*

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement*

Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(g)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) *Cross references*

(1) Authority to issue orders, processes, and judgments

For authority of district courts generally to enforce the provisions of this title, see section 7402.

(2) Penalties

For penalties applicable to violation of section 6420 (e)(2), 6421(f)(2), 6424(d)(2), 6427(g)(2), or 7602, see section 7210.

**Federal Rules of Civil Procedure**

Rule 26(b)(3)

*Trial Preparation: Materials.* Subject to the provisions of subdivision (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)

(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Rule 21(a)(3)

In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

**Federal Rule of Evidence 501**

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

No. 79-886

SUPREME COURT, U.S.
FILED
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE FEDERAL RESPONDENT

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## BRIEF FOR THE UNITED STATES AND THE FEDERAL RESPONDENT

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### QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects against the compelled disclosure of communications between an attorney—serving as a corporation's general counsel, and as an officer and director—and the corporation's employees, only when such employees play a substantial role in directing the corporation's response to the legal advice sought.

2. Whether the work product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947), protects against compelled disclosure of documentary evidence sought by an internal revenue summons where the Internal Revenue Service shows necessity for production of such evidence.

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[1] In addition to The Upjohn Company, petitioners include Gerard Thomas, Vice-President and Secretary of The Upjohn Company. In addition to the United States, respondents include David E. Nowak, Special Agent, Internal Revenue Service.

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## OPINIONS BELOW

The opinion of the United States Magistrate (Pet. App. 9a–37a; J.A. 171a–209a), which was adopted by the district court (Pet. App. 39a–40a; J.A. 210a–211a), is not officially reported. The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 600 F.2d 1223.

## JURISDICTION

The judgment of the court of appeals was issued on June 28, 1979 (Pet. App. 45a–46a). On September 10, 1979, the court of appeals denied a petition for rehearing, with suggestion for rehearing en banc (Pet. App. 43a). The petition for a writ of certiorari was filed on December 7, 1979, and was granted on March 17, 1980 (J.A. 214a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner The Upjohn Company is a multinational corporation engaged in the manufacture and marketing of pharmaceuticals. It conducts its business in approximately 150 foreign countries, through both foreign subsidiaries and foreign branches of United States subsidiaries. Upjohn files a consolidated federal income tax return with some of its subsidiaries, but some of its foreign subsidiaries or affiliates are not included in the return. Petitioner Gerard Thomas is a vice-president, secretary, and general counsel of Upjohn. He is also a member of its board of directors and serves as an officer of some of Upjohn's subsidiaries (Pet. App. 12a; J.A. 91a, 101a, 174a). Despite his legal training, Thomas does not necessarily engage in his functions as a lawyer when he serves the Company in his capacities as an officer or director (J.A. 100a).

In January 1976, Upjohn's independent accountants conducted an audit of one of the Company's foreign subsidiaries. During the audit, the accountants discovered that since January 1, 1971, the subsidiary had made payments to foreign government employees, or to third parties believed to be acting as intermediaries for foreign government employees. Such payments, which exceeded

$4 million from 1971 through 1975, were made for the purpose of securing government business. The fact of these payments was known by certain of Upjohn's inside directors and officers associated with the international operations (Pet. App. 12a; J.A. 174a–175a).

In January 1976, the auditors reported the questionable payments to petitioner Thomas and other individuals in the Company (J.A. 89a). Thomas consulted R.T. Parfet, Jr., the chairman of the board, and outside counsel (J.A. 91a). In a letter dated January 16, 1976, Parfet advised Upjohn's employees that he had "asked Gerard Thomas to investigate certain matters of particular concern to Corporate Management and to the Board of Directors." In his capacity as chairman of the board and chief executive officer, Parfet stated to the employees that he felt that "the subject must be thoroughly reviewed and [had] charged Gerard Thomas with that responsibility" (J.A. 39a). He further warned that "It is imperative that you be completely candid and cooperate fully in responding to questions and requests for information" (J.A. 39a; see also *id.* at 28a).

Thomas thereafter conducted a factual investigation to determine the nature and extent of the questionable payments. The internal investigation was prompted, in part, by Upjohn's concern that it had not properly reported the payments to the Securities and Exchange Commission. As a part of the investigation, Thomas and outside counsel prepared a written questionnaire to be mailed by R.T. Parfet, Jr., the chairman of the board, to 53 foreign general and area managers of the Company. The questionnaire sought information regarding questionable payments and directed the addressee to return the form to Thomas (Pet. App. 13a; J.A. 40a–43a, 175a).

In a letter dated March 8, 1976, accompanying the questionnaires, Parfet stated to the Company employees that he had decided that "it is imperative that the management of this company [have] full knowledge of any [improper] payments * * * made by The Upjohn Company or any of its subsidiaries" (J.A. 40a). He encouraged Upjohn's employees "to discuss these questions with anyone in your subsidiary who you believe would be able to provide useful information" (J.A. 42a). If the employee had any questions, Parfet advised that he "should feel free to communi-

cate directly with your management and with Gerard Thomas who has general responsibility for this investigation" (J.A. 43a). With respect to the information transmitted by the employees, Parfet imposed a limited standard of confidentiality. In his letter of March 8, he stated as follows (*ibid.*):

> This investigation and the information which it develops should be treated as highly confidential and not discussed with any persons other than those Upjohn employees who might be of assistance to you in providing the information requested. This matter should not be discussed with anyone not employed by the Company except our regularly retained public accounting firms and such persons as are specifically designated by Mr. Thomas.

In requesting Upjohn's employees to cooperate with the inquiry, Parfet assumed a sympathetic posture as to their personal responsibilities for making such payments. He acknowledged that Upjohn's employees might not have been aware of the impropriety of their past practices and that they might have made questionable payments under the best of intentions because "they believed [that they] were in the best interests of The Upjohn Company" (*ibid.*). However, in order to eliminate any "uncertainty in the future as to the policy with respect to the practices which are the subject of [the] investigation," Parfet announced that he had "issued a detailed 'Statement of Policy on Political Contributions, Payments to Government Personnel and Proper Accounting Practices.'" He thereupon put the employees on notice that it would be their "continuing responsibility to insure that all Upjohn employees under [their] supervision are aware of and comply with the rules set forth in this Statement" (J.A. 43a).

Thomas interviewed all persons to whom a questionnaire had been sent, and he and two outside counsel also interviewed other persons who had not been mailed questionnaires. A total of 86 persons were interviewed, some of whom were no longer employees of the Company. The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Thomas and outside counsel (Pet. App. 13a–14a; J.A. 92a–93a, 175a–176a). The responses to the questionnaires indicated that Upjohn em-

ployees had made questionable payments to foreign government employees (J.A. 112a). Upjohn was concerned that these payments might have caused violations of the securities and tax laws, as well as foreign currency controls, and that these violations could expose the Company to shareholder suits (J.A. 123a–124a).

On March 26, 1976, following the initial investigation of the questionable payments, Upjohn filed a preliminary report (J.A. 161a–166a) with the SEC on its Form 8–K, voluntarily disclosing detailed information with respect to some, but not all, of the questionable payments. The report disclosed data with respect to payments since January 1, 1971, totaling $2,710,000 in 22 of the 136 countries served by the Company. The report also stated that the investigation was still in progress and that further information would be furnished when the investigation was concluded. However, Upjohn did not submit to the SEC any of the interview notes or questionnaires containing the information upon which the reports were based (J.A. 96a). Upjohn also agreed to furnish the SEC with any additional data it might request with respect to the questionable payments (Pet. App. 14a; J.A. 120a, 176a). At the time the report was filed, Thomas was aware that other companies were making similar disclosures and that the SEC had indicated a policy of more lenient treatment of corporations which voluntarily disclosed such questionable payments. Upjohn made these voluntary disclosures in the hope of obtaining lenient treatment by the SEC (Pet. App. 2a, 14a; J.A. 176a). With the exception of the three or four senior executive officers of the Company, Thomas did not advise any of the Upjohn employees who answered the questionnaires or who were interviewed, of the Company's disclosure to the SEC[2] (J.A. 118a).

Upjohn also made the reports available to the Internal Revenue Service, which then commenced its own investigation of the matter to determine the federal income tax consequences of the payments (Pet. App. 2a; J.A. 157a).

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[2] On July 26, 1976, the Company filed with the SEC an amendment to its Form 8–K, in which it reported that it had received oral or written responses to all questionnaires, that it had conducted additional interviews, and that the total of the questionable payments exceeded $4 million (Pet. App. 14a; J.A. 167a–170a, 176a).

Prior to Upjohn's filing of the Form 8-K report with the SEC in March 1976, the Internal Revenue Service was about to complete an audit of Upjohn's 1972 and 1973 consolidated federal income tax returns. However, because of Upjohn's disclosures on its Form 8-K, the Service did not close the audit. Instead, the revenue agents referred the case to the Internal Revenue Service's Intelligence Division, which thereupon undertook a joint investigation with revenue agents for the period 1972-1974 (Pet. App. 14a-15a; J.A. 177a).

Upjohn furnished two schedules to the Internal Revenue Service regarding the questionable payments.[3] One schedule is entitled "Summary of Company Payments by Year (Companies Listed Are Those Companies with U.S. Tax Implications Only)." The schedule purported to list all questionable payments made from 1971 to early 1976, disclosing the date, the amount, the company making the payments, and the country in which the payment was made. On this schedule Upjohn listed only those payments that it believed had an effect on its consolidated federal income tax returns. The payments as to which Upjohn made such detailed disclosures to the Service totalled approximately $700,000 (Pet. App. 15a; J.A. 69a-70a, 177a).

The second schedule is less detailed and purported to be a country-by-country summary of payments made in connection with Upjohn's foreign operations. Upjohn claimed that these payments, which totalled approximately $3,700,000, did not affect its consolidated federal income tax liability. Upjohn also furnished the Internal Revenue Service with source documentation underlying the schedules, such as cancelled checks, vouchers, invoices, advices, etc. (Pet. App. 15a; J.A. 70a-71a, 177a).

Upjohn permitted the Internal Revenue Service to interview Company employees involved in making questionable payments, and has agreed to transport some foreign employees in countries not accessible to revenue agents to nearby neutral countries. Upjohn, however, refused to permit its employees to answer questions about transactions that, in its judgment, did not affect its con-

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[3] These schedules were never put in evidence, but were examined by the magistrate *in camera* (Pet. App. 15a n.2; J.A. 177a n.2).

solidated federal income tax returns (Pet. App. 16a; J.A. 121a, 178a).

Upjohn's limited disclosure with respect to $3.7 million of the improper payments was inadequate to permit an independent evaluation of their tax consequences. The Internal Revenue Service accordingly sought production from petitioner Gerard Thomas of the documents generated in the course of the internal investigation. Those documents were in part responses by 53 of the Company's foreign general and area managers to written questionnaires prepared by Thomas. In addition, the documents consisted of written notes made by Thomas and two outside counsel of telephone or personal interviews of all corporate employees to whom the foreign payment questionnaire had been sent, as well as 33 other employees who had not received a questionnaire (Pet. App. 2a, 13a; J.A. 175a).

Upon Upjohn's refusal to make available the corporate documents generated in its internal investigation of the improper foreign payments, Special Agent David E. Nowak of the Internal Revenue Service issued a summons to Upjohn and Gerard Thomas to appear and testify concerning Upjohn's tax liability for 1972–1974. The summons was issued pursuant to the Service's statutory authority under 26 U.S.C. 7602. It directed petitioners to produce (Pet. App. 9a, 11a; J.A. 17a–18a, 171a, 173a): "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments * * * by the * * * Company or any of its affiliates * * * to determine whether any funds of the * * * Company had been improperly accounted for on the corporate books" including "but not limited to written questionnaires sent to managers of the * * * Company's foreign affiliates, and memorandums or notes of the interviews conducted * * * with officers and employees of the * * * Company."

2. *The district court's decision.* Petitioners refused to produce the records sought by the summons on the grounds that they were protected by the attorney-client privilege and the work product doctrine. Pursuant to 26 U.S.C. 7402(b) and 7604(a), the United States and Special Agent Nowak commenced this proceeding to enforce the summons in the United States District Court for the

Western District of Michigan. In an affidavit filed with the district court, Special Agent Nowak swore that the testimony and records sought by the summons were not already in the possession of the Internal Revenue Service and that such evidence was necessary for the determination of the federal tax liabilities of Upjohn and its subsidiaries for 1972–1974 (J.A. 13a, 21a).

The case was referred to a magistrate who, after holding a hearing, concluded that the attorney-client privilege protects only communications from those Upjohn employees who were part of the Company's control group and thereby played a substantial role in directing the corporation's response to the legal advice sought. In so holding, the magistrate observed that "In view of the overwhelming acceptance of the control group test, I have concluded that it should be followed in this case" (Pet. App. 22a; J.A. 184a; footnote omitted).[4]

The magistrate further ruled that Upjohn had waived the attorney-client privilege by its disclosures to the SEC of the questionable payments in its 8–K report of March 26, 1976, and its amended 8–K report of July 26, 1976, its agreement to furnish the SEC with any additional data it might request with respect to such payments, and

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[4]The magistrate explained (Pet. App. 22a–23a; J.A. 184a–185a):

> It is apparent from the record that the matter as to which the interviewees made the disclosures to Mr. Thomas was a matter of overwhelming importance to the Company but not one as to which any of the interviewees would be given any substantial role. When Mr. Thomas first heard of the questionable payments, he went first to the Chairman of the Board to discuss the matter. The questionnaire that was sent to the employees went out over the signature of the Chairman of the Board. Mr. Thomas' concern was with the SEC ramifications, the tax consequences, currency regulations, and the like.(Tr. 79–80). These are matters on the highest corporate level and hardly within the domain or authority of the persons interviewed. Clearly, these persons in completing the questionnaires and submitting to interviews were simply giving information to Mr. Thomas to enable him to advise the Board of Directors and its Chairman as to how to handle the securities, tax, and related problems which the questionable payments created. Only the latter had the authority to act in these areas. Thus the disclosures made by the interviewees to Mr. Thomas or the Company's outside counsel do not fall within the attorney-client privilege.

its transmission of the SEC reports and related data to the Internal Revenue Service. As the magistrate observed, "Having disclosed some data with respect to questionable payments, it now seeks to hold back other data relating to the same matter. Under the circumstances, the Company should be deemed to have waived the attorney-client privilege with respect to the same matter, if indeed it ever existed" (Pet. App. 24a; J.A. 186a–187a).

The magistrate also rejected petitioners' claim that the summoned material was protected from disclosure by the work product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). After noting "at the outset * * * [that there is] a serious question as to whether the work product doctrine is even applicable in a summons enforcement proceeding" (Pet. App. 26a; J.A. 188a), the magistrate concluded that the government had made a showing of "substantial need" and an inability "without undue hardship" to obtain the information by other means. See Fed. R. Civ. P. 26(b). In support of this conclusion, the magistrate noted that Upjohn "has relegated to itself the determination of what is or is not relevant to the investigation of the Revenue Service" (Pet. App. 28a; J.A. 190a).[5]

Finally, the magistrate found that the necessity for compelling disclosure in this case is also indicated by the fact that the persons interviewed reside in foreign countries beyond the jurisdiction of the court and thus are not subject to compulsory process (Pet. App. 28a; J.A. 191a). Although Upjohn has said that it will make its employees available for interviews, it has not agreed to bring them to the United States for this purpose (J.A. 120a–121a). But even if such employees were made available for interviews, the magistrate noted that it was "not unreasonable to expect some hesitancy, if not actual hostility, in answering questions with respect to payments which might

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[5] In the magistrate's view, Upjohn's self-serving and uncorroborated assertion of relevance could not stand against Special Agent Nowak's testimony that "instead of accepting the summary of the Company's investigation at face value, he wishe[d] to obtain additional information, such as verification of the recipients of the payments, and to check whether there may have been payments which were not recorded on the Company's books" (Pet. App. 28a; J.A. 190a–191a; see also J.A. 56a–57a, 71a–72a).

have been made in violation of local laws" (Pet. App. 29a; J.A. 191a). The magistrate also observed that "where interviews have in fact been permitted, the scope of the inquiry has been limited to what the Company's counsel deemed appropriate" (*ibid.*; see also J.A. 79a–81a).

In light of the foregoing, the magistrate found that "the record establishes ample necessity for compelling disclosure of the summoned material in this case, and that the work product doctrine does not shield the material from such disclosure" (Pet. App. 30a; J.A. 192a). He therefore recommended that the summons be enforced (Pet. App. 37a; J.A. 199a). The district court adopted the magistrate's recommendation and ordered the summons enforced (Pet. App. 39a–40a, 41a–42a; J.A. 210a–211a, 212a).

3. *The court of appeals' decision.* a. The court of appeals affirmed in part, reversed in part, and remanded the case to the district court for further findings of fact (Pet. App. 1a–8a). It agreed with the district court that the scope of the attorney-client privilege in the context of communications between in-house counsel and corporate employees was limited to the "control group" of the corporation, *viz.*, those senior officers who play a substantial role in directing the corporation's response to the legal advice given. In so holding, it rejected petitioners' claim that the applicability of the privilege should be governed by the "subject matter" test. Pursuant to that test, if the corporation's employee possesses information acquired in the ordinary course of business relating to the subject matter of his employment and the information is communicated confidentially to corporate counsel to assist him in giving legal advice to the corporation, then the communication is privileged (Pet. App. 4a–7a). In the court of appeals' view, the "subject matter" test urged by petitioners would "encourage corporate managers to shield themselves from information about possibly illegal transactions" (*id.* at 5a–6a) and create a "broad 'zone of silence'" (*id.* at 7a).

However, because the record indicated that some of the communications sought by the summons were made by senior corporate officers who were in all likelihood members of the "control group," the court of appeals remanded the case to the district court for further findings and to deny enforcement of the summons with respect to these "control group" communications (Pet. App. 7a).

b. The court of appeals also rejected petitioners' claim that the documents sought by the summons were protected by the work product doctrine. It left undisturbed the district court's finding (Pet. App. 30a; J.A. 192a) that "the record establishes ample necessity for compelling disclosure of the summoned material in this case, and that the work product doctrine does not shield the material from such disclosure." However, the court of appeals also expressed the view that "[t]he work-product doctrine of *Hickman* v. *Taylor* * * * [329 U.S. 495 (1947)] and Fed. R. Civ. P. 26(b)(3) is not applicable to administrative summonses issued under 26 U.S.C. § 7602" (Pet. App. 7a n.13). As the court of appeals concluded, "[t]he IRS simply must show that the inquiry is relevant to a good faith investigation conducted pursuant to a legitimate purpose, that the information sought is not in the IRS' possession and that proper administrative procedures have been followed. *United States* v. *Powell*, 379 U.S. 48, 57–58 (1964)" (Pet. App. 7a n.13).[6]

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[6] Special Agent Nowak further swore that "no recommendation for prosecution of the taxpayer has been made to the United States Department of Justice" (J.A. 21a, see also *id.* at 57a).

Petitioners correctly point out (Br. 59 n.73) that on September 17, 1979, after the decision of the court of appeals in this case, the Internal Revenue Service made a recommendation to the Department of Justice regarding a criminal prosecution that might arguably be related to the investigation that led to the issuance of the summonses here. Since the enforceability of a summons is determined by the facts existing at the time of its issuance (see *Couch* v. *United States*, 409 U.S. 322, 329 n.9 (1973)), the Service's subsequent recommendation should have no bearing on this case. However, because the nature of that prosecution is not part of the record before the Court, we agreed with petitioners at the time they filed their brief that any claim that the Service's recommendation rendered the summons unenforceable under *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978) should be addressed by the district court in the first instance. However, on July 30, 1980, the Assistant Attorney General in charge of the Tax Division advised petitioners' counsel that the Department of Justice had declined the Service's prosecution recommendation and had transmitted the case back to the Internal Revenue Service. For the convenience of the Court, we have lodged copies of these letters with the Clerk. Hence, the Service's post-summons recommendation for prosecution is no longer an issue in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

### I.

The principal question presented in this case—involving the proper scope of the attorney-client privilege in the context of communications from corporate employees to the corporation's counsel—is one over which the courts of appeals have divided and which this Court left unresolved in *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided Court, 400 U.S. 348 (1971). As illustrated by the instant case, the issue is important for the enforcement of the internal revenue laws when the Commissioner issues summonses to compel disclosure of corporate records in accordance with his authority under 26 U.S.C. 7602. But the significance of the attorney-client privilege in the corporate setting is not limited to IRS summons enforcement proceedings. Since the corporation is a fact of modern business life in virtually every sphere of commercial activity, the issue of the attorney-client privilege could arise in other disputes between a federal agency and a corporation or in the context of a grand jury investigation. Moreover, as the decisions of the lower courts demonstrate, the question has significance as well for private litigation involving corporations.

The decision of this Court as to the proper test for the attorney-client privilege for corporations will govern a broad spectrum of litigation arising in the federal courts. Rule 501 of the Federal Rules of Evidence states that in the absence of any constitutional or statutory provision or judicial rule, "the privilege of a witness * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The federal courts have accordingly looked to "federal common law" in determining the scope of evidentiary privileges in summons enforcement proceedings as in analogous grand jury proceedings.[7]

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[7] See, *e.g.*, *United States* v. *Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); *Colton* v. *United States*, 306 F.2d 633, 636 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963). See also *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373, 379 (3d Cir. 1976); *In re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir.), cert. denied, 439 U.S. 1046 (1978); *United States* v. *Holmes*, 594 F.2d 1167, 1171 (8th Cir. 1979); *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977).

Thus, this Court's resolution of the conflict among the circuits with respect to the question involving the attorney-client privilege will establish a uniform rule for summons enforcement and grand jury proceedings, federal criminal cases, and other cases involving claims arising under federal statutes.

A. While the question before the Court involves the limits of the attorney-client privilege in the corporate setting, we submit at the outset that the record in this case supports the district court's conclusion that the employee communications sought by the summons were neither made in confidence nor maintained in confidence in an attorney-client relationship. In urging Upjohn's employees to cooperate with the Company's internal investigation into questionable foreign payments, the Chairman of the Board did not limit their communications to counsel but permitted them to discuss the matter with anyone employed by the Company as well as the Company's regularly employed outside accountants. Moreover, petitioner Gerard Thomas, who gathered the information sought by the summons here, was a member of senior management as well as the Company's general counsel. Finally, Upjohn's subsequent disclosures to the IRS of part of the material sought by the summons amounted to a waiver of the attorney-client privilege with respect to the remaining employee communications. Indeed, this rule against partial waiver is designed to prevent the very stratagem employed by Upjohn in this tax investigation—disclosing only so much of allegedly privileged matter as is helpful to its case. The attorney-client privilege cannot be selectively invoked with respect to the same subject matter so as to be used as both a sword and a shield. 8 J. Wigmore, *Evidence* § 2327 (McNaughton rev. 1961). Thus, whatever the scope of the attorney-client privilege in the corporate setting, the decision of the court of appeals can be affirmed on the independent ground that the privilege never attached or that Upjohn waived whatever privilege might have attached.

B. The rule that we urge here in determining the scope of the attorney-client privilege in the corporate setting is the control group test. Under that test, applied by the courts below in the instant case and by many other deci-

sions as well,[8] the privilege is limited to communications from those senior officers or employees of the corporation who control or play a substantial role in any decision the corporation may make as a result of the advice of counsel. Petitioners, however, seek a much broader privilege that would cloak virtually all communications between corporate employees and corporate counsel in accordance with the so-called "subject matter" test. In petitioners' view, the attorney-client privilege should protect all communications without regard to the employee's function in the corporate structure, if the communication is made by the employee at the direction of his superiors and the subject matter of the communication concerns the performance of the employee's duties.[9]

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[8] See, *e.g.*, *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa.), petition for mandamus and prohibition denied, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963); *Natta* v. *Hogan*, 392 F.2d 686 (10th Cir. 1968); *In re Grand Jury Investigation* (*Sun Co.*), 599 F.2d 1224 (3d Cir. 1979); *United States* v. *Amerada Hess Corp.*, 619 F.2d 980 (3d Cir. 1980). See also *Potashnick* v. *Port City Const. Co.*, 609 F.2d 1101, 1119 n.12 (5th Cir. 1980); *Virginia Electric & Power Co.* v. *Sun Shipbuilding & D.D. Co.*, 68 F.R.D. 397 (E.D. Va. 1975); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963); *United States* v. *IBM*, 66 F.R.D. 154 (S.D. N.Y. 1974).

The control group test has been adopted by statute in six states: Arkansas (Ark. Stat. Ann. § 28-1001, Rule 502(a)(2) (repl. 1979)); Maine (Me. Rev. Stat. Ann., Rules of Evidence, Rule 502); Nevada (Nev. Rev. Stat. § 49.075 (1979)); North Dakota (N.D. Cent. Code Ann., Rules of Evidence, Rule 502 (Supp. 1979)); Oklahoma (Okla. Stat. Ann. tit. 12, § 2502 (West 1980)); South Dakota (S.D. Codified Laws Ann. § 19-13-2, Rules of Evidence (rev. 1979)).

Moreover, the control group test has been adopted in Rule 502(a)(2) of the Uniform Rules of Evidence. Although it was originally incorporated in the Proposed Federal Rules of Evidence, it was withdrawn in 1971 largely as a result of the affirmance by an equally divided Court in *Harper & Row Publishers, Inc.* v. *Decker*, *supra*. See 2 J. Weinstein & M. Berger, *Evidence* ¶ 503[01] (1979).

[9] The subject matter test was first announced by the Seventh Circuit in *Harper & Row Publishers, Inc.* v. *Decker*, *supra*, and followed in modified form in *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc). See pages 40-43, *infra*. See also *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1165 (D. S.C. 1974); *Hasso* v. *Retail Credit Co.*, 58 F.R.D. 425 (E.D. Pa. 1973); *Syl-*

As we shall show (pages 26–45, *infra*), the control group test is more consistent with the policies underlying the attorney-client privilege. The principal contemporary justification for the attorney-client privilege is its presumed value in encouraging clients to make full disclosures to their attorneys. 8 J. Wigmore, *supra*, §§ 2291, and 2306, at 590. If damaging information could more readily be obtained from an attorney following disclosure than from the client himself in the absence of disclosure, a client aware of that fact would be reluctant to confide in his lawyer. See, *e.g.*, *United States* v. *Louisville & N.R.R.*, 236 U.S. 318, 336 (1915). The result would be greater difficulty in obtaining fully informed legal advice. But "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). See also *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (Friendly, J.); *United States* v. *Goldfarb*, 328 F.2d 280 (6th Cir. 1964); 8 J. Wigmore, *supra*, § 2291.

We submit that the communications from Upjohn's employees to petitioner Thomas would have been made in the absence of any protection of the attorney-client privilege. The employees in question were required by R.T. Parfet, Jr., Upjohn's chairman and chief executive officer, to respond to the questionnaires and to cooperate with the inquiry. Moreover, the inquiry itself was directed to the Company's employees by petitioner Thomas, a vice president and director. Hence, the employees' incentive to cooperate was not prompted by the protection afforded by the attorney-client privilege but by the fact that their superiors directed them to cooperate and that this direction was made in the corporate chain of command. In every practical sense of the word, Upjohn's middle and lower-level employees were not Thomas' clients; they were company subordinates reporting to him at the direction of

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*gab Steel & Wire Corp.* v. *Imoco-Gateway Corp.*, 62 F.R.D. 454 (N.D. Ill. 1974), aff'd, 534 F.2d 330 (7th Cir. 1976) (table); *In re Ampicillin Antitrust Litigation*, 25 Fed. R. Serv. 2d 1248, 1254–1255 (D. D.C. 1978).

senior management who initiated the inquiry upon the recommendation of counsel and appointed Thomas to conduct it. Only this senior management had the authority and discretion to control the corporation's response to any legal advice sought, and thus only they were, in effect, the corporate client whose communications with counsel should be protected by the attorney-client privilege. Indeed, the Company's disclosure to the IRS of the information provided by many of its employees, without even informing, much less consulting, them, strongly supports the inference that senior management, who made the decision to disclose (and thereby waived any claim of privilege) was the client, and not the company's middle and lower-level employees.

C. The control group test is consistent with this Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), which formulated the qualified attorney work product doctrine now codified in Fed. R. Civ. P. 26(b). There, in considering whether an attorney's notes of interviews with his client's employees were subject to discovery by opposing counsel, the Court at the outset rejected the claim that the statements were protected by the attorney-client privilege. In this respect, the Court stated, "We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis" (329 U.S. at 508).

D. The control group is a practicable, flexible standard that is in accord with the realities of corporate life. Indeed, the opinion of the court of appeals effectively meets petitioners' claim that the real decision-makers in a corporation are often lower-level or middle-level management who are not included in the control group. The court defined a control group as "those officers, *usually* top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given" (Pet. App. 5a; emphasis added). Here, where the necessary decisions were to be made by the senior officers and the board of directors, these officers and directors constituted the "control group." If, on the other hand, a district manager needed legal advice on a decision that he was to make, he would be in the control group for purposes of that decision.

E. The subject matter test urged by petitioners is unrelated to the policies underlying the attorney-client privilege and is subject to abuse. Under the subject matter test, the attorney-client privilege encompasses all communications made by a corporation's employees to corporate counsel where the communication is made at the direction of the employee's superiors and the subject of the communication is the performance by the employee of the duties of his employment.

Under the subject matter test, corporations would be allowed to use privileged communications to collect information about the activities of lower-level employees which they would collect regardless of the privilege. The subject matter test therefore fails to reflect the policy of the privilege to encourage communications with counsel that would otherwise not be made.

Indeed, the overly broad subject matter test would encourage corporations to create a "zone of silence" around any information that has potential legal consequences by funneling such information through house counsel. Such manipulation of the attorney-client privilege and the use of corporate executives (such as petitioner Thomas) who happen to be lawyers to perform what are essentially non-legal fact gathering tasks would undermine the legitimate right of law enforcement agencies "to satisfy themselves that corporate behavior is consistent with the law and the public interest." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950).

## II.

The work product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947), does not protect the documentary evidence sought by the Internal Revenue Service summons here from compelled disclosure because the government showed ample necessity for the production of that evidence.

We do not quarrel with petitioners' submission that the work product doctrine is applicable to IRS summons enforcement proceedings. Apart from the decision below, the sole appellate authority to the contrary, *United States* v. *McKay*, 372 F.2d 174, 176 (5th Cir. 1967), relied upon the analogy of the Commissioner's summons authority to the

inquisitorial power of the grand jury. But the courts of appeals have subsequently held without exception that the work product rule is applicable to a grand jury subpoena.[10] Since there appear to be no unique characteristics or special policies inherent in summons enforcement cases that would foreclose similar application of the work product doctrine in that context, we agree that the *Hickman* rationale and Rule 26(b), Fed. R. Civ. P., can be invoked to resist production of an attorney's work product pursuant to an internal revenue summons.

This is not to say, however, that petitioners' work product claim should defeat enforcement of the summons at issue here. We submit that the district court's finding—left undisturbed by the court of appeals—that "the record establishes ample necessity for compelling disclosure of the summoned material in this case" (Pet. App. 30a; J.A. 192a)—is correct and presents a proper basis for affirmance of the judgment rejecting petitioners' work product claim.

Here, the government seeks from counsel copies of questionnaires submitted to him by Upjohn's employees and his notes of interviews with such employees with respect to questionable payments they made abroad on behalf of the Company. Some of the employees are no longer with the Company. Most of the remaining employees are located throughout the world, some in countries where the government representatives would not have easy access. While Upjohn has offered to transport these employees to a neutral country, it has forbidden its employees to discuss with the Internal Revenue Service any payments that Upjohn has concluded are irrelevant. Since the interviews are to be conducted according to ground rules established by Upjohn and Upjohn refuses to allow its employees to discuss certain information, it is clear that absent production of the questionnaires and interviews the information is unavailable to the Internal Revenue Service. Furthermore, many of the employees are foreign nationals who may not be subject to the process of the federal

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[10] See *In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc.*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1973).

courts. The information sought by the summons is therefore not available by direct examination of the employees—whose fading memories of the myriad transactions involved are, in any event, a far less accurate source than the questionnaires and interview notes for determining Upjohn's correct tax liability.

## ARGUMENT

### I

### THE ATTORNEY-CLIENT PRIVILEGE PROTECTS AGAINST THE COMPELLED DISCLOSURE OF COMMUNICATIONS BETWEEN A CORPORATION'S GENERAL COUNSEL AND ITS EMPLOYEES ONLY WHEN SUCH COMMUNICATIONS ARE MAINTAINED IN CONFIDENCE AND THE EMPLOYEES ARE PART OF A "CONTROL GROUP" WHICH PLAYS A SUBSTANTIAL ROLE IN DIRECTING THE CORPORATION'S RESPONSE TO THE LEGAL ADVICE SOUGHT

As the Court reaffirmed only last Term in *Trammel* v. *United States*, No. 78–5705 (Feb. 27, 1980), slip op. 10, quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950), any claim of privilege must overcome the settled principle that " 'the public * * * has a right to every man's evidence.' " Accord: *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). See also *Herbert* v. *Lando*, 441 U.S. 153, 175 (1979); *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932); 8 J. Wigmore, *supra*, § 2192. Because testimonial privileges preclude the use of highly relevant evidence and therefore tend to be "an obstacle to the administration of justice" (*id.* § 2192, at 73; see *United States* v. *Nixon*, *supra*, 418 U.S. at 711–713), such privileges are tolerable only when they "are designed to protect weighty and legitimate competing interests" (*id.* at 709). See also *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

In a claim of attorney-client privilege, the weighty and legitimate competing interests are particularly difficult to

establish because that privilege rests upon grounds that are not objectively demonstrable. As we have noted (page 14, *supra*), the principal justification for the privilege is to encourage a client to place in his lawyer the "unrestricted and unbounded confidence" (*United States* v. *Kovel*, 296 F.2d 918, 921 (2d Cir. 1961)) that is viewed as essential to the protection of his legal rights.[11] But whether and to what extent the privilege actually does promote candor in lawyer-client relations remains a subject of considerable dispute. The only serious empirical study of the subject suggests that the presumed correlation between the privilege and client candor may not in fact exist. See Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226 (1962). Given the complexity of modern corporate life, clients of necessity seek out attorneys largely because there is no ready substitute for legal advice.[12] Their candor with their lawyers may be encouraged by the privilege, but surely must result principally from a realization that the costs of withholding information are likely to be far greater than the disadvantages flowing from the risk of compelled disclosure of their

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[11] The privilege originated as a protection for the attorney's honor—allowing him to keep the confidence of his client—and it belonged to the attorney alone. 8 J. Wigmore, *supra*, § 2290. In the eighteenth century, this reasoning fell into disrepute. Since that time, the privilege has been justified as necessary to encourage full disclosure by the client. At the time of this shift in the rationale of the privilege, the client himself could not be called to testify in either civil or criminal proceedings. Accordingly, in the absence of any privilege, any confidence reposed in an attorney would have provided a substantial addition to the sources of proof available to the client's opponent. 8 J. Wigmore, *supra*, § 2290; 2 J. Weinstein & M. Berger, *Evidence* ¶ 503[02] (1979). Under present practice, however, a party must respond to discovery and must testify if called, subject only to his privilege against compulsory self-incrimination. Accordingly, it is questionable whether the privilege is still as helpful as it once was in encouraging the client's confidence. See *Whiting* v. *Barney*, 30 N.Y. 330, 332–333 (1864).

[12] It is now well settled that the attorney-client privilege is available to corporations. *Radiant Burners, Inc.* v. *American Gas Ass'n*, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963).

confidential communications. Indeed, even assuming that corporate employees are aware of the privilege (although there is no suggestion that Upjohn's employees were so aware in this case at the time they participated in Thomas' inquiry), the uncertainty as to whether the privilege applies to a particular communication greatly weakens the basis for any presumption that such an employee in fact relied upon it.

The classic definition of the attorney-client privilege is set forth in *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–359 (D. Mass. 1950):

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Accord: 8 J. Wigmore, *supra*, § 2292.

Like other privileges or immunities, the attorney-client privilege stands in derogation of the public's "right to every man's evidence" (8 J. Wigmore, *supra*, § 2192, at 70), and as "an obstacle to the investigation of the truth" (*id.*, § 2291 at 554). Accordingly, "[i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle" (*ibid.*). As Dean Wigmore succinctly put it, "Its benefits are all indirect and speculative; its obstruction is plain and concrete" (*ibid.*). Given the high social cost of immunizing a class of evidence from discovery, it is vital to a claim of privilege that the communications between client and attorney are made in confidence and maintained in confidence. And, as with all privileges, the claimant has the burden of establishing all essential elements. *United States* v. *Kovel*, *supra*, 296 F.2d at 923.

### A. The Attorney-Client Privilege Should Not Protect Upjohn's Employees' Communications Because They Were Neither Made In Confidence Nor Maintained In Confidence In An Attorney-Client Relationship

While the principal question before the Court involves the propriety of the control group test in establishing the limits of the attorney-client privilege in the corporate setting, we submit at the outset that the privilege never attached because the communications were not made in the context of an attorney-client relationship. Moreover, even if the privilege did attach, petitioner Upjohn waived it because of its failure to maintain such communications in confidence.

1. Petitioner Thomas' multiple roles in the corporation as vice-president, secretary, director, and general counsel make it unclear whether he conducted the inquiry in his capacity as an attorney. In this respect, it is significant that Chairman Parfet's initial letter of January 16, 1976, did not identify Gerard Thomas as the Company's general counsel. Rather, he simply advised the employees that he had "asked Gerard Thomas to investigate certain matters of particular concern to Corporate Management and to the Board of Directors" (J.A. 39a). While Parfet later, in the March 8 letter accompanying the questionnaire, identified Thomas as the Company's general counsel (J.A. 40a), it is not clear that the employees submitted the information to Thomas in his capacity as a lawyer for the purpose of obtaining legal advice or intended the submission to be a confidential communication in a context of an attorney-client relationship. Indeed, given Thomas' other roles as officer and director and the fact that the employees were directed to cooperate with him as with any other company executive in the chain of corporate command, the case for application of the attorney-client privilege is hardly compelling. To the contrary, the record suggests that the employees made the communications for business purposes, rather than for the purpose of securing legal services. In these circumstances, petitioners have not carried their burden of establishing that the privilege ever attached to the communications at issue here.[13]

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[13] Petitioners argue (Br. 12 n.4) that the court of appeals left undisturbed findings that legal advice had been sought by Upjohn from

2. It is, of course, settled that the client's subsequent disclosure to a third party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed, either because such disclosure indicates that confidentiality is no longer intended or serves as a waiver of the privilege.[14] As Judge Friendly observed in *In re Horowitz*, *supra*, 482 F.2d at 81–82, "it is vital to a claim of privilege that the communications between client and attorney were made in confidence and have been maintained in confidence."

The record in this case supports the district court's conclusion (Pet. App. 23a–25a; J.A. 185a–187a) that the communications at issue were neither made in confidence nor maintained in confidence. To begin with, Chairman Parfet's letter of March 8, 1976, accompanying the questionnaire permitted the employees to discuss the matter with "your management" (J.A. 43a). The only limitation imposed upon the employees was not to discuss the investigation "with anyone not employed by the Company except our regularly retained public accounting firms and such persons as are specifically designated by Mr. Thomas" (*ibid.*). Clearly, any communications with the Company's auditors or management would not be covered

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professional legal counsel. But the cited record references to the magistrate's findings of fact (Pet. App. 12a–13a; J.A. 174a–175a) simply set forth the undisputed fact that Thomas "conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the Company with respect to the payments" (Pet. App. 13a; J.A. 175a). They do not, however, support the conclusion that Thomas functioned in the capacity of an attorney rather than as a company executive vis-a-vis the company employees so as to cloak their communications to him under the attorney-client privilege. At all events, the magistrate's findings do not support the conclusion that Upjohn's employees knew that they were communicating with Thomas as an attorney. Hence, there are no findings that support the existence of an attorney-client privilege with respect to the communications at issue.

[14] See 8 J. Wigmore, *supra*, § 2311, at 599; D. McCormick, *Evidence* § 93, at 197 (Cleary ed. 1972); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953, 981 (1956); *United States* v. *Cote*, 456 F.2d 142 (8th Cir. 1972); *United States* v. *Schoeberlein*, 335 F. Supp. 1048 (D. Md. 1971); *B&C Trucking Co.* v. *Holmes & Narver, Inc.*, 39 F.R.D. 317 (D. Hawaii 1966); *United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954).

by the privilege and other persons designated by Thomas might not be covered as well.

Whatever further fact finding might reveal as to the degree of confidentiality maintained by Upjohn's employees with respect to the information produced by Thomas' investigation, the Company's subsequent disclosures to the Internal Revenue Service resulted in a waiver of the privilege. As a general rule, a waiver of the privilege as to all communications between an attorney and client on the same subject follows from the voluntary waiver of one or more similar communications. This is the case even if the disclosures are accompanied with reservations. "Thus, if a client, through his attorney, voluntarily waives certain communications, but guarded with a specific written or oral assertion at the time of the waiver that it is not its intention to waive the privilege as to the remainder of all similar communications, the privilege, as to the remaining undisclosed communications, is nevertheless waived." *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1162 (D. S.C. 1974). Indeed, this rule against partial waiver is designed to prevent the very stratagem employed by Upjohn in this tax investigation—disclosing only so much of allegedly privileged matter as is helpful to its case.

The attorney-client privilege cannot be selectively invoked so as to be used as both a sword and a shield. See 8 J. Wigmore, *supra*, § 2327 (the "principle of completeness" is analogous to this principle); D. McCormick, *supra*, § 93. As the court observed in *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974), "Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." Thus, even assuming that the employees' communications were once privileged, Upjohn's partial disclosures to the IRS amounted to a waiver of the privilege with respect to the material sought by the summons. The attorney-client privilege cannot be invoked to aid Upjohn's uncorroborated self-serving claim that the withheld evidence has no bearing on its United States tax liability.[15]

[15] Contrary to Upjohn's contention (Br. 6 n.2), questionable payments by controlled foreign subsidiaries could affect its United States

Contrary to petitioners' argument (Br. 12 n.4), which the court of appeals apparently accepted (Pet. App. 7a n.12), for purposes of determining whether a waiver occurred, there is no basis for a distinction between the facts

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tax liability for the years in issue in some circumstances. To begin with, if the subsidiaries improperly deducted the questionable payments in derogation of Section 162(c) of the 1954 Code (26 U.S.C.) and joined in the consolidated return, those deductions would of necessity have understated Upjohn's United States tax liability. The summons in this case is intended in part to corroborate Upjohn's assertion that it has accounted for all questionable payments made by its subsidiaries which were part of the consolidated group.

But even on the assumption that there are no remaining questionable payments of members of the consolidated group to be disclosed, Upjohn's United States tax liability may nevertheless be affected. Section 951 of the Code provides that a United States shareholder of a "controlled foreign corporation" shall include in income his pro rata share of the controlled foreign corporation's Subpart F income. Subpart F income is defined in Section 952, and is specifically limited by Section 952(c) to the earnings and profits of the controlled corporation for the taxable year, as defined in Section 964. During the tax years in issue, the earnings and profits of the controlled subsidiary could have been reduced by illegal bribes or kickbacks although no deduction would have been allowed under Section 162(c). See Rev. Rul. 77-442, 1977-2 Cum. Bull. 264. (Section 1065 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1653, added Section 952(a)(4) specifically to include in Subpart F income any illegal bribes, kickbacks or other payments, and amended Section 964(a) to provide that such payments, made after November 3, 1976, shall not reduce earnings and profits for purposes of Subpart F (see Section 1066 of the Tax Reform Act of 1976, 90 Stat. 1654)). Accordingly, Upjohn argues that any such payments by controlled foreign corporations before November 3, 1976, could not have affected its consolidated income tax returns for the years in issue because such payments, by reducing earnings and profits, would have been eliminated from Subpart F income.

Although the computation of Subpart F income may not be affected, there may be situations where payments were made by a subsidiary, not for its own benefit, but for the benefit of the parent or another member of the consolidated group. Depending on the factual circumstances, the Commissioner might determine that such payments require reallocation of income between Upjohn and its controlled foreign subsidiaries under Section 482, or that they were constructive dividends to the beneficiary of such payments. See generally B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶¶ 7.05, 15.06 (4th ed. 1979). Indeed, David S. Creamer, manager of Upjohn's corporate tax planning unit, conceded on cross-examination (J.A. 138a, 146a-147a) that there could be numerous ways in which the parent's tax liability could be affected. Such results are

disclosed by Upjohn to the IRS and the original communications to counsel from which they were selectively gleaned. Surely whether a waiver of the attorney-client privilege occurred cannot turn upon whether the piece of paper containing the disclosed facts is the original client communication or another document upon which those facts have been recorded.[16]

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not affected by Rev. Rul. 77-442, *supra*, the authority upon which petitioners rely. That ruling addresses only the determination of earnings and profits, and does not speak to the question of possible constructive dividends or Section 482 allocations. As Creamer's testimony indicates, it is therefore erroneous to conclude that these payments could never affect Upjohn's United States tax liability. Since the tax consequences of these payments depend on the circumstances surrounding the payments, the Commissioner is entitled to summon the evidence necessary to make an independent determination of Upjohn's tax liability pursuant to his authority under 26 U.S.C. 7602.

[16] In this respect, *United States* v. *Cote*, 456 F.2d 142 (8th Cir. 1972), upon which the court of appeals relied for its conclusion that no waiver occurred (Pet. App. 7a n.12), actually supports our submission that Upjohn waived the privilege with respect to all the documents sought by the summons. There, the taxpayer's filing of a tax return, which contained in part information set forth on otherwise privileged workpapers, was held to be a "disclosure [that] effectively waived the privilege not only to the transmitted data but also as to the details underlying that information" (456 F.2d at 145). Here, too, Upjohn's partial disclosure of the substance of its employees' communications concerning questionable payments waived the privilege with respect to all of its communications with counsel with respect to that subject. As the court stated in *United States* v. *Tellier*, 255 F.2d 441, 448 (2d Cir.), cert. denied, 358 U.S. 821 (1958), "the privilege attaches to the substance of a communication and not to the particular words used to express the communication's content." See also *United States* v. *Shibley*, 112 F. Supp. 734, 742 (S.D. Cal. 1953).

The other authorities cited by the court of appeals (Pet. App. 7a n.12) do not support its distinction between a waiver of the facts disclosed by Upjohn and the underlying data. Neither *United States* v. *Judson*, 322 F.2d 460 (9th Cir. 1963), nor *Colton* v. *United States*, 306 F.2d 633, 639 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963), involved a waiver. Moreover, unlike this case, *IBM* v. *Sperry Rand Corp.*, 44 F.R.D. 10, 13 (D. Del. 1968), involved a waiver "to the limited extent" of a particular subject discussed in a set of documents. Here, on the other hand, the evidence sought by the summons involves a single subject, *viz.*, Upjohn's questionable payments.

In our view, Upjohn's selective disclosures to the IRS waived the attorney-client privilege. Thus, whatever the scope of the attorney-client privilege in the corporate setting, the decision of the court of appeals can be affirmed on the independent ground that Upjohn waived the privilege.[17]

### B. The Control Group Test Is Consistent With The Policy Underlying The Attorney-Client Privilege Of Encouraging Clients To Make Full Disclosure To Their Attorneys

1. As we have pointed out (pages 14, 19, *supra*), the principal policy justification for the attorney-client privilege is to encourage clients to make full disclosure to their attorneys without fear that their attorneys would become witnesses against them. "However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Fisher* v. *United States*, *supra*, 425 U.S. at 403.

Here, Upjohn's employees would have made the disclosures to petitioner Thomas in the absence of the privilege. Their factual submissions to Thomas were made pursuant to the orders of R.T. Parfet, Jr., the chairman and chief executive officer of the Company, and were not prompted or encouraged by the protection of the attorney-client privilege. In directing the employees to cooperate with the investigation, neither Parfet nor Thomas gave any assurances to the employees that their disclosures would be protected by the attorney-client privilege. Given their subordinate place in the corporate hierarchy, Upjohn's

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[17] If the Court holds that the privilege did not attach or that Upjohn waived the privilege, the case should be remanded to the court of appeals with instructions to modify its judgment so that the summons could be immediately enforced. In these circumstances, there would no longer be any need for the district court to determine which communications were made by members of the "control group" (see Pet. App. 7a).

employees could hardly have refused to cooperate with Parfet's directive to provide Thomas with the pertinent information necessary to make business decisions on behalf of the Company.

Thus, the attorney-client privilege did not play any part in encouraging Upjohn's employees to make the required disclosures; they did so in compliance with an order issued to them in the corporate chain of command. Indeed, the fact that Upjohn's senior management ultimately decided to disclose many of the employees' statements to the SEC and the IRS—without so much as advising the employees that such disclosures were being made (Pet. App. 22a–23a; J.A. 18a, 184a–185a)—graphically demonstrates that the employees did not rely upon the attorney-client privilege in cooperating with Thomas' investigation. If the privilege protected these statements, the Company's senior management surely would have had to consult with the affected employees prior to the disclosure of their statements to law enforcement agencies. Hence, it is plain that the employees had no privilege either at the time they made their communications or at the time Upjohn determined to disclose them in part. In fact, the decision by Upjohn's senior management to make the disclosures to the IRS shows that senior management, with authority to act for the corporation in this matter, and not the employees, was in fact the client of Thomas as the alter ego of his corporate client and confirms the correctness of the control group test.[18]

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[18] Petitioners suggest (Br. 39 n.41) that the argument that a corporation will disclose information provided to its counsel by non-control group employees "ignores reality" because it will discourage the employees from cooperating with counsel. In support of this contention, they claim "that there are few cases where the corporation has waived the privilege vis-a-vis the employee" (*ibid.*). See also Amicus Curiae Brief of the American College of Trial Lawyers at 13 n.10. But one need go no further than this case for an instance where management has made such a disclosure. Indeed, any employee who is seriously concerned about his own potential liability cannot rely on what the corporation has done in the past. Rather, he must be aware of what the corporation has the power to do.

Petitioners further urge (Br. 39 n.41) that the solution is to broaden, rather than narrow, the corporation's privilege to alleviate this problem. But the employee whose disclosures are communicated to man-

As the representative officials of the client, the control group had the authority to make disclosures on behalf of the company in accordance with the advice of counsel and therefore play a role in directing the corporation's response to the legal advice sought. It is accordingly the communications of the control group with counsel that are protected by the attorney-client privilege.

In light of the foregoing, it is clear that even on the assumption that the attorney-client privilege applies to communications of employees outside the control group, such employees could not depend upon any assurance of confidentiality conferred by the privilege because, in fact, there is none from their standpoint. Corporate counsel interviewing employees outside the control group cannot promise them that their communications will remain confidential. To the contrary, candid counsel must advise such employees that in all likelihood their communications will be revealed to their supervisors and that their communications might be disclosed to law enforcement or regulatory agencies if the corporate control group determines that such disclosure is in the best interests of the corporation. The destiny of each communication necessarily rests in the hands of the control group; and, like them, the corporation's counsel owes his professional loyalty to his corporate client rather than to the individual non-control group employees. Accordingly, the corporation's attorney-client privilege cannot encourage a non-control group employee interviewed by corporate counsel to disclose any more than he would be willing to disclose to any other management representative. In short, the subordinate employee's willingness to cooperate with corporate counsel is therefore solely a function of his deference to the corporate chain of command and bears no relationship to the availability of the attorney-client privilege. Since extension of the attorney-client privilege to protect the employees' communications would not achieve its purpose of encouraging candid disclosure, the privilege should not apply to such evidence.

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agement through its counsel can in no event have an independent privilege that would restrict management's use of the information. There is no escaping the fact that management, and not the lower-level employee, is the client who has the privilege and who has full authority to disclose the information transmitted by the employee.

2.a. Given the fact that the employees would have made the disclosures even in the absence of the attorney-client privilege, there is no basis for petitioners' contention (Br. 35, 39) that the control group test would inhibit communications between corporate counsel and employees outside the control group. The attorney's need to consult such employees does not necessarily dictate that their communications should be privileged. The policy of the attorney-client privilege demands that it apply only when it would enhance candid disclosure. That is not the case with respect to employees outside the control group. As the Third Circuit correctly concluded in *In re Grand Jury Investigation* (*Sun Co.*), *supra*, 599 F.2d at 1236, such employees would in all events confide in corporate counsel whether or not the privilege were applicable. "In short, we do not believe that extension of the corporation's privilege against disclosure would significantly add to an attorney's ability to obtain information from employees outside the control group" (*ibid.*). Accordingly, the control group test will not discourage lower-level employees from cooperating with corporate counsel. Such employees respond to such inquiries because they are directed to do so by corporate management.

b. Nor will the application of the control group test discourage a corporation from conducting internal investigations or dissuade corporate counsel from ferreting out the necessary information in such investigations. Despite petitioners' (Br. 35–41) and several of the amici curiae's assertions to the contrary (American Bar Association Br. 15–17; American College of Trial Lawyers Br. 23–28; Federal Bar Association Br. 18), even in the absence of the privilege, corporate management will continue to conduct such investigations in a thorough manner simply because they have little choice.

A corporation has a strong incentive to monitor the activities of all its employees that might expose it to liability. Though the directors who ultimately control the activities of a corporation may usually rely on the officers' good faith and on the books of account of the corporation, generally applicable fiduciary principles impose upon directors an affirmative duty to act with reasonable diligence to inquire into the facts and to take whatever corrective action is required when the propriety of the offi-

cers' conduct or the accuracy of the corporate books is called into question, as the outside auditors did in the instant case. See 3A W. Fletcher, *Cyclopedia of Private Corporations* § 1039, at 38 (M. Wolf rev. 1975). Failure to conform to these responsibilities may implicate the directors and the corporations on whose boards they serve in violations of state corporate laws or the federal securities laws. See *Graham* v. *Allis-Chalmers Manufacturing Co.*, 41 Del. Ch. 78, 85, 188 A.2d 125, 130 (1963); 15 U.S.C. 77o; 15 U.S.C. 78t. As the Third Circuit correctly noted in *In re Grand Jury Investigation* (*Sun Co.*), *supra*, 599 F.2d at 1237, "the potential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential."[19]

The fact that communications similar to those made by Upjohn's employees would have taken place without regard to the availability of the attorney-client privilege is graphically illustrated by the facts of this case. In the course of an audit by Upjohn's independent auditors, the corporation's control group was notified of the existence of certain questionable payments made by employees stationed abroad. Thus, they were put on notice that the corporate books might not have projected an accurate financial picture. Although the extent of the payments was unknown, the possibility clearly existed that Upjohn's financial statements were materially inaccurate or that the payments had exposed the Company to potential liabilities that had to be disclosed. An investigation into the scope and nature of these payments was therefore required. The chairman turned to one of the officers, who served as well as general counsel, and ordered him to obtain the factual

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[19] See 15 U.S.C. (Supp. I) 78m(b)(2). Under this provision, which Congress added to the Securities Exchange Act of 1934, 15 U.S.C. 77b *et seq.*, as a part of the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, every publicly held company is required to keep accurate books and records and maintain internal accounting controls that are sufficient to provide, *inter alia*, reasonable assurances that transactions are executed and recorded in accordance with management's direction. This statute was enacted as a result of information submitted in the SEC's voluntary disclosure program. See page 31 and note 20, *infra*.

information from the lower-level employees that was required for the Company to make the proper business decisions. The chairman directed those employees to respond fully and accurately to the inquiry. At the time Upjohn initiated this investigation, the scope of the attorney-client privilege in the corporate context was unsettled. Thus, the corporation had no guarantee that the information provided by the lower-level employees was protected by the attorney-client privilege. The investigation nevertheless proceeded. It is therefore apparent that the existence *vel non* of the attorney-client privilege did nothing either to encourage the initiation of the investigation or to delineate its scope. The investigation was undertaken simply because good "business sense" required it.[20]

Nor is there merit in petitioners' suggestion (Br. 35) that an attorney operating under the control group test "will be uncomfortably aware that any information he elicits [from a non-control group employee] might later be used against the corporation or the employee by an adver-

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[20] The investigation was also prompted by petitioner's desire to participate in the SEC's voluntary disclosure program. Under this program, petitioners were aware that the SEC could require disclosure of the supporting documents. The Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976 (*reprinted in* Fed. Sec. L. Rep. (CCH) No. 642, at 9 n.8 (May 19, 1976)), states:

> An essential element of the voluntary disclosure program is that companies must agree to grant the Division of Enforcement access to the report and its underlying documentation.
>
> Materials submitted to the Commission may be subject to release under the Freedom of Information Act or pursuant to Congressional requests. * * *

Moreover, petitioner Thomas conceded that the company was willing to disclose whatever documentation the SEC might require in order to obtain the benefits of the program. As he testified (J.A. 120a):

> I think at the time of the disclosure, that we had to make some representation. I can't remember—I believe it was in a letter, but it may have been by verbally that we would, if they felt it was necessary, maybe that—that we would make additional disclosures to their Enforcement Division. I believe the practice was and the implication was that they wouldn't press on that, they wouldn't make us do it; but as part of the voluntary program, we had to agree to do that, if they determined that was necessary.

sary" and, hence, "will be hesitant to probe deeply." Even in the absence of the absolute protection afforded by the attorney-client privilege, communications between counsel and employees outside the control group would be protected in some degree by the qualified work product privilege recognized in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). (See Point II, pages 46–51, *infra*.) Thus, a party seeking production of such material will not have untrammeled access to information collected by an attorney but will have to show necessity for such disclosure. (See Point II, pages 46–51, *infra*.)

At all events, a guarantee of secrecy does not establish or narrow an attorney's obligation in the giving of legal advice to his client. See *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1102 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971). If an attorney is to fulfill his ethical obligation to the corporation to which he is rendering legal advice, he should resolve any fear he may have of disclosure in favor of a complete and comprehensive investigation. See *In re Grand Jury Investigation* (*Sun Co.*), *supra*, 599 F.2d at 1236–1237. A claim that attorneys will ignore their ethical obligations to their clients in the absence of the protection of the attorney-client privilege is poor justification indeed for an extension of the privilege.[21]

### C. The Control Group Test Is Consistent With This Court's Decision In *Hickman* v. *Taylor*, 329 U.S. 495 (1947)

1. The Court's analysis in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), which formulated the attorney work product doctrine now codified in Fed. R. Civ. P. 26(b), is consist-

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[21] Petitioners also suggest (Br. 35–36) that if the "control group" test were adopted, a corporate counsel would hesitate to advise strongly against any action which he suspects that his client might ultimately decide to adopt for fear that his advice would be subject to disclosure. But any such advice concerning a possible course of action would be expressed to those within the corporation who would decide upon the course of conduct to be pursued. These individuals would necessarily be members of the control group, and such communications would be privileged. At all events, the prospective decision of the client does not define the attorney's ethical obligation to advise his client fully and completely on all aspects of a proposed course of action. *Garner* v. *Wolfinbarger*, *supra*, 430 F.2d at 1102.

ent with the control group test employed by the courts below. That case involved a wrongful death action against the Taylor & Anderson Towing and Lighterage Company, which was in the business of operating tugboats. One of the boats sank and five crew members drowned. In anticipation of litigation, the company engaged a law firm to defend them against potential lawsuits. In this connection, a member of the law firm took statements from the survivors with an eye toward the anticipated litigation and the survivors signed these statements. In the ensuing litigation, the plaintiffs sought discovery of all such statements. The lawyers for the company refused to comply on the ground that such requests called "for privileged matter obtained in preparation for litigation" and constituted "an attempt to obtain indirectly counsel's private files" (329 U.S. at 499).

In considering whether such material was subject to discovery by plaintiffs' counsel, the Court at the outset rejected the tugboat company's claim that the survivors' statements in its attorney's files were protected by the attorney-client privilege. As the Court stated (329 U.S. at 508):

> We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. * * * For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

The situation here is precisely analogous. Here, as in *Hickman*, subordinate employees of a client company responded to questions put by company counsel. Such employees did not engage the counsel nor did they play any role in directing the company's response to the legal advice sought. They are outside the company control group. Hence, their communications to the company counsel are

not protected by the attorney-client privilege because their status is not that of a client but of a subordinate employee charged by superiors to disclose the facts of a particular incident to company counsel.

2. Contrary to the decisions adopting the broader subject matter test, the Court's refusal in *Hickman* to extend the protection of the attorney-client privilege to the lawyer's conversations with the partnership's employees was based upon the status of the employees within the company rather than upon the duties the employees were performing at the time of the accident. Exponents of the "subject-matter" or the modified "subject matter" test seek to avoid the conflict with *Hickman* v. *Taylor* by exempting from the privilege information gathered by employees as mere "bystander witnesses." See *Harper & Row Publishers, Inc.* v. *Decker*, *supra*, 423 F.2d at 491; *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 609 (8th Cir. 1977) (en banc). See *In re Grand Jury Investigation* (*Sun Co.*), *supra*, 599 F.2d at 1235-1236 n.7. Thus, in attempted deference to *Hickman*, the subject matter test requires that, to be privileged, the subject matter of the employee's communications to the attorney be "within the scope of the employee's corporate duties" (*Diversified Industries, Inc.* v. *Meredith*, *supra*, 572 F.2d at 609) and not relate to "fortuitously[ ] observe[d] events which may generate liability on the part of the corporation" (*Harper & Row Publishers, Inc.* v. *Decker*, *supra*, 423 F.2d at 491).

But this attempted reconciliation with *Hickman* cannot withstand analysis. The manner in which an employee obtains his information is entirely unrelated to the issue whether the privilege is required to encourage communication of the information to counsel. Accordingly, the "scope of employment" gloss on the subject matter test does not further any policy of the attorney-client privilege.

More importantly, the subject matter test begs the critical question whether the employee is the "client" whose communications are for the purpose of obtaining legal advice. An employee's regular duties may well include observing and reporting any accident that may subject the corporation to liability. If a corporation were so to state in an employment manual, or to require regular accident reports from employees, such observations might

well then be "nonfortuitous" and "within the scope of the employee's corporate duties" and privileged under the subject matter test. If so, this Court's rejection of the privilege in *Hickman* would be effectively overruled by the fiat of the nation's corporations.

For these reasons, the artificial nature of the "scope of employment" gloss is readily apparent. The crew members in *Hickman* were not "mere bystanders" who fortuitously observed an event that might generate liability. While engaged in the performance of their duties, they witnessed an accident which was a foreseeable possibility within the scope of their employment. The accident clearly involved a matter within the scope of their duties. See *In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc.*, 81 F.R.D. 691, 694 (S.D. N.Y.), rev'd on other grounds, 599 F.2d 504 (2d Cir. 1979). The Court's rejection of the claim of privilege necessarily turned on the employees' subordinate status and not the nature of their duties.

*Harper & Row* and *Diversified Industries* therefore misread *Hickman*. The employee-attorney communications in *Hickman* were found to be the nonprivileged communications of witnesses not because the employees' observations were outside the scope of their duties, but because the employees' status was outside the "control group" of the tugboat company. The employees were not clients of the attorney.[22] Since the "control group" test turns on the status of the particular employee within the corporation it is consistent with *Hickman*.[23]

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[22] Indeed, had Taylor himself, one of the partners of the tugboat company, been present on the sinking vessel, there can be no doubt that his communications with counsel about the events of the accident would have been privileged, as would the communications of any client in such a situation, even though his observations would not have concerned the subject matter of his business duties. But such communications would not be privileged under the scope of employment test. Thus, unless this Court in *Hickman* intended radically to alter the attorney-client privilege's traditional application to communications between client and attorney, it reached its result on the basis of the status of the employees and not on what they saw. The employees were not the client.

[23] Amicus American College of Trial Lawyers seeks to distinguish *Hickman* (Br. 11 n.7) on the ground that the employees in that case

### D. The Control Group Test Is A Practicable Standard For Establishing The Scope Of The Attorney-Client Privilege That Is In Accord With The Realities Of Corporate Life

1. In light of the foregoing, we submit that the control group test is the appropriate standard that furthers the policy of the attorney-client privilege of encouraging client candor and is consistent with this Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). But it is also a practicable test that responds to the countless factual variations that occur in the corporate setting. Thus, the control group test does not inflexibly decree that only certain corporate officials by virtue of their position or rank constitute the control group. As Judge Kirkpatrick stated in his seminal formulation of the test in *City of Philadel-*

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were in an adversarial posture. In support of this purported distinction, they cite a brief parenthetical comment in a statement filed by defense attorney Fortenbaugh after the trial court opinion was entered that "Settlement has been made in various nominal amounts with all of the four survivors * * * " (No. 47 Hickman record at 70a). Fortenbaugh's deposition, however, clearly states (*id.* at 56a) that statements of the survivors were taken as soon as was practicable, as was always the procedure in such cases. There is no indication that an adversarial relationship existed at the time the statements were made and it is clear that no litigation was instituted by any of the survivors (*id.* at 61a).

Of greater import in considering the scope of the Court's opinion in *Hickman*, however, is the fact that no court adverted to any adversarial relationship between the company and its surviving employees in discussing the status of statements of those employees, treating the employees, instead, as mere witnesses at all times. See 329 U.S. at 508; 4 F.R.D. 479, 480 (E.D.Pa.); 153 F.2d 212, 222 (3d Cir. 1945). It is clear from the Court's opinion that it did not view the employer-employee relationship in *Hickman* as sufficient to convert communications of the employee into communications of the client partnership for purposes of the attorney-client privilege. It therefore had no reason even to reach the question posed by amicus American College of Trial Lawyers. Indeed, Judge Kirkpatrick's formulation of the "control group" test in *City of Philadelphia* v. *Westinghouse Electric Corp.*, *supra*, was largely in response to *Hickman* v. *Taylor*, which, according to Judge Kirkpatrick (210 F. Supp. at 485), "very clearly shows the distinction between statements by employees of the client and statements by the client itself." Since Judge Kirkpatrick wrote the trial court opinion in *Hickman* v. *Taylor*, he was fully aware of its factual bases.

*phia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D.Pa.), petition for mandamus and prohibition denied, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963):

> if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

The fact that the composition of the control group may vary from case to case does not, as petitioners contend (Br. 40–44), render the control group test unworkably vague or unpredictable in result. Here, the court of appeals defined the control group as "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given" (Pet. App. 5a; footnote omitted). Contrary to petitioners' assertion, there is nothing in this formulation that is beyond the abilities of the average corporate counsel to understand and apply. In this case, it is undisputed that the corporate officials who sought and received legal advice were the senior officers and directors of the parent corporation (Pet. App. 22a–23a; J.A. 184a–185a). The bulk of the employees interviewed were not within this group. The remand ordered by the court of appeals was not caused by any difficulty in determining who was in the control group, but because some employees, who both parties agree belonged to the control group, were denied the privilege.[24]

We do not quarrel with petitioners' assertion (Br. 42–43) that the control group has been given varying interpretations in various cases. But that fact is hardly surprising in light of the different types of corporate decisions that can

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[24] See Govt. C.A. Br. 17 n.4. For the convenience of the Court, we are lodging a copy of this brief with the Clerk.

be made in these cases. Any reasonable corporate attorney, however, is capable, in a given fact situation, of determining whether he is merely gathering facts from a subordinate employee or is giving legal advice to a decision-maker. The definition of the "control group" is within the ability of the average corporate counsel to understand and apply.

At all events, any minor variations in the composition of the control group from case to case will not discourage candid employee communications with counsel in the corporate setting. This appears to be self-evident from the apparent ability of corporations to function effectively in the past under conditions where the scope of the attorney-client privilege in the corporate context had not been conclusively established and the independent need for such consultations to take place nevertheless existed (see pages 12–15, *supra*).

2. Nor do the variations in the composition of the control group from case to case render the control group insensitive to the realities of corporate life. Petitioners argue (Br. 16–17, 20) that the real decision-makers in a corporation are often lower-level or middle-level management who are not included in the "control group" as determined by the court of appeals. They therefore urge that the "control group" test ignores this aspect of corporate life and deprives the real corporate decision-makers of any privilege whatsoever.

But the opinion of the court of appeals effectively refutes petitioners' claim. In this case, where the necessary decisions were to be made by the senior officers and the board of directors, these officers and directors constituted the "control group." If, on the other hand, a district manager needed legal advice on a decision that he was to make, he would be in the "control group" for purposes of that decision. Petitioners therefore err in characterizing (Br. 12; footnote omitted) the decision of the court of appeals as holding that the " 'client' consists only of the corporation's controlling group of central managers." To the contrary, the control group test protects communications made by "those officers, *usually* top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given" (Pet. App. 5a; emphasis supplied).

The court of appeals' control group test is therefore not as inflexible as petitioners would have it. Any employee of a corporation who needs legal advice for a decision he makes or has a substantial role in making would be covered by the privilege under the control group test. Far from ignoring the realities of corporate life, the control group test deals with those realities in a practical manner by assessing the authority and the responsibilities of the employees communicating with corporate counsel in a given case. Those who are seeking legal advice on behalf of the corporation fall within the privilege. On the other hand, those employees who, like bystander witnesses, merely provide facts on which legal advice to other employees or officers will be based are not within the absolute privilege. See D. McCormick, *supra*, § 87.

### E. The Subject Matter Test Is Unrelated To The Policies Underlying The Attorney-Client Privilege And Encourages Abuse

In marked contrast to the control group test applied by the courts below, the subject matter test urged by petitioners would encompass all communications made by a corporation's employees to corporate counsel where the communication is made at the direction of the employee's superiors and the subject of the communication upon which the attorney's advice is sought is the performance by the employee of the duties of his employment. See *Harper & Row Publishers, Inc.* v. *Decker*, *supra*, 423 F.2d at 491–492. Subsequent to *Harper & Row*, the Eighth Circuit adopted the subject matter test in *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (1977), adding the requirement that the employee's superior must have requested the employee to communicate with the lawyer so that the corporation could obtain legal advice. Accord: 2 J. Weinstein & M. Berger, *Evidence* ¶ 503(b)[04](1979).

A large corporation's employees regularly generate a great deal of information that is transmitted to their superiors and, in some instances, to the corporation's attorneys. Gathering of such information is an essential aspect of the conduct of the corporation's business. Under the broad subject matter test, corporate management would be allowed to use counsel to create a channel of

privileged communications to collect information about the activities of lower-level employees which they would collect regardless of the privilege. Since the policy justification for the privilege is to encourage communications with counsel that would otherwise not be made, the subject matter test fails to reflect the purposes of the privilege.[25]

Indeed, the subject matter test would encourage corporations to create a broad "zone of silence" around any information that has potential legal consequences by funneling such information through house counsel. Thus, for example, a former SEC Commissioner recently recommended at a professional conference that any internal in-

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[25] Contrary to the argument of the amicus American Bar Association (Br. 4–9), the question as to the scope of the attorney-client privilege cannot be resolved by protecting the communications of any corporate employee to counsel on the formalistic basis that he is an agent of the corporation. To be sure, a client's freedom of communication requires that he be permitted to engage a person to communicate with his attorney, if circumstances so dictate. On the other hand, the privilege does not protect the disclosures of third parties, even though the lawyer may communicate with those parties at the instance of the client. See 8 J. Wigmore, *supra*, § 2317(2).

If a corporation were permitted to designate any of its employees as its agent and thereby claim protection for communications, the corporate privilege would be far broader than that of an individual. The question is therefore whether all corporate employees are deemed to be the "client" on the basis of their agent status or whether some might be so far removed from the decision-making level as to be essentially third parties vis-a-vis the corporation. As one commentator has observed, "The problem cannot be solved by a simple reference to the law of agency, for it is not enough that the spokesman is a corporate agent; the question is whether the good that the privilege seeks to accomplish—candor between client and attorney—would be defeated unless the particular agent were permitted to speak for the corporation" Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953, 956 (1956). Here as we have pointed out (pages 26–28, *supra*), the policy of the privilege would not be served by extending it to the employee communications at issue because the employees would have made their disclosures even in the absence of the privilege. Indeed, if the question turned on the formalities of the law of agency, the employees' statements in *Hickman* v. *Taylor*, *supra*, would have been protected by the attorney-client privilege, a claim that the Court explicitly rejected (329 U.S. at 508).

vestigation conducted by a corporation into possible wrongdoing should be undertaken by outside counsel and "at all events, it should not be undertaken by non-lawyers." Wheat, *The Attorney-Client Privilege and the Attorney's Work Product Rule—Some Issues for the Corporate Lawyer*, Vol. 3 Course Materials, University of California, San Diego, 7th Annual Securities Regulation Institute 18 (Jan. 1980).[26] Such manipulation of the

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[26] The pertinent part of Mr. Wheat's "Some Practical Hints" reads as follows (Wheat, *supra*, at 18–19; emphasis in original):

> A. It is highly desirable that any investigation into possible corporate wrongdoing be undertaken by the corporation *before* the SEC or any other agency gets into the act.
>
> B. It is preferable for the investigation to be undertaken by outside counsel; at all events, it should not be undertaken by non-lawyers.
>
> C. Should you undertake an investigation, it is advisable to enter into an engagement letter which specifies, among other things:
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> 1. that you are to investigate for the purpose of rendering legal advice,
>
> 2. that your engagement is in preparation for possible tax, SEC criminal class and/or derivative actions against the corporation, should the results of your inquiry show that the law was violated,
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> 3. that you expect to prepare a report addressed to the board (or a committee of the board) which will contain your legal advice and will not be disseminated beyond the board, certain designated officers and the inside general counsel, unless you are instructed differently by the board.
>
> D. A senior officer of the corporation should instruct in writing employees you wish to interview to cooperate fully with you in furnishing information you may request relating to his activities as an employee of the corporation.
>
> E. All documents prepared in the course of the investigation should *in fact* be held confidential and, where appropriate, marked to show their confidential and privileged nature.
>
> F. If any documents are voluntarily given to the SEC, it should be pursuant to formal order of investigation and a relevant subpoena.
>
> G. If accountants and other non-lawyers are to be engaged to assist in the investigation, they should be engaged by, and report *only* to, the lawyers in charge of the investigation.
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> * * * * *

attorney-client privilege and the use of corporate executives (such as Thomas) who happen to be lawyers to perform what are essentially non-legal fact gathering tasks would undermine the legitimate right of law enforcement agencies "to satisfy themselves that corporate behavior is consistent with the law and the public interest." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). See also *United States* v. *White*, 322 U.S. 694, 700 (1944). As a noted commentator foresaw long before the current conflict between the control group and subject matter tests reached the courts, "Where corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large." Simon, *The Attorney-Client Privilege As Applied to Corporations*, 65 Yale L.J. 953, 955 (1956). The author expressed the belief, which is consistent with our submission, that "Few judges * * * would long tolerate any common law privilege that allowed corporations to insulate all their activities by discussing them with legal advisers." Simon, *supra*, at 955–956.[27]

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[27] To be sure, the modification to the subject matter test adopted by the Eighth Circuit in *Diversified Industries* would limit the opportunity for wholesale manipulation of the privilege by requiring that the employee's superior must have requested the employee to communicate with the lawyer so that the corporation could secure legal advice. Under this modified subject matter test, a corporation would be unable to shield all potentially sensitive information by funneling it through its counsel. However, in a particular instance, it would be relatively easy, as in the instant case, for management to direct an employee to communicate with counsel so that the corporation could obtain legal advice. Such an arrangement would not be unusual, for as petitioners acknowledge (Br. 19–20), legal advice is relevant in almost every activity of modern corporate enterprise.

At all events, it is significant that petitioner (Br. 21–23), and the amici American Bar Association (Br. 6) and the American College of Trial Lawyers (Br. 10 n.5) reject the modified subject matter test. Petitioners argue (Br. 23) that "It should suffice if a corporation's attorney-client privilege were understood to encompass all communications made in confidence by corporate employees to corporate counsel regarding matters within their knowledge as employees and relevant to advice sought by the corporation from counsel." Thus, the broad subject matter test urged by petitioners would result in the very abuses that even the formulation in *Diversified Industries* sought to avoid.

Finally, it is no answer to argue, as do petitioners (Br. 29), that a litigant may always obtain the testimony of each individual employee. The argument might have some merit in a case in which the corporation is small. But in a corporation of the size of Upjohn, the argument stands reality on its head. Here, there were some 53 questionnaires and 86 interviews. There could conceivably have been hundreds or thousands. It is for this reason that corporate officers and directors have the fiduciary duty to apprise themselves of the activities of their subordinates and that Rule 33, Fed. R. Civ. P., provides that an officer or agent shall be designated to provide all the information known to a corporation. Yet petitioners seek to undermine these policies by using corporate counsel to investigate wrongdoing and then claiming protection for their findings under the absolute attorney-client privilege. If corporate officers can fulfill their fiduciary duties without apprising themselves of unpleasant facts that they, as opposed to their counsel, may have to disclose, then counsel will indeed become the exclusive repository of such unpleasant facts. Indeed, Upjohn's denial (Br. 28) that this is the consequence of its argument is belied by its acknowledgment (Br. 19) that such facts are not realistically available from any central source other than counsel. The Court should therefore reject the overly broad subject matter test and adopt the control group test as more responsive to the policies of the attorney-client privilege and to the responsibilities of corporations to the public.

### F. State Law Does Not Favor The Subject Matter Test

Contrary to petitioners' argument (Br. 24–27), the subject matter test is not supported by "[t]he overwhelming majority of state courts." That assertion seriously mischaracterizes the import of the state authorities. To begin with, as we have pointed out (page 13, note 8, *supra*), six states (Arkansas, Maine, Nevada, North Dakota, Oklahoma, and South Dakota) have adopted the control group test by statute. Petitioners therefore err in including Nevada and South Dakota in their list of states

(Br. 26 n.30) favoring a broad test in defining the attorney-client privilege for corporations.[28]

Moreover, although petitioners concede (Br. 26 n.30) that the Appellate Court of Illinois applied the control group test in *Day* v. *Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964), they claim that the authority of that case has been undermined by the Illinois Supreme Court's decision in *Cox* v. *Yellow Cab Co.*, 61 Ill. 2d 416, 337 N.E.2d 15 (1975). In petitioners' view, the *Cox* opinion's citation of *D.I. Chadbourne, Inc.* v. *Superior Court*, 60 Cal. 2d 723, 388 P.2d 700 (1964)—a California Supreme Court decision upholding the subject matter test—demonstrates a shift in the Illinois decisional law in favor of the subject matter test.

But an examination of *Cox* reveals that the court simply cited *D.I. Chadbourne, Inc.* for the undisputed proposition that the claimant to the privilege must prove the facts that give rise to the privilege (see 61 Ill. 2d at 420; 337 N.E.2d at 18). In *Cox*, the court held that the claimant had not established a factual basis for the applicability of the privilege. In the absence of any evidence that the communications were made in the context of an attorney-client relationship, the fact that they found their way into the files of an attorney was deemed irrelevant. Hence, *Cox* in no way vitiates the authority of *Day* v. *Illinois Power Co.*, *supra*, or the applicability of the control group test in Illinois. See *Johnson* v. *Frontier Ford, Inc.*, 68 Ill. App. 3d 315, 319 (1979).[29]

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[28] See Nev. Rev. Stat. § 49.075 (1979) ("'Representative of the client' means a person having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client"); S.D. Codified Laws Ann. § 19-13-2, Rules of Evidence (rev. 1979) ("A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client").

[29] The remaining decisions cited by petitioners (Br. 26 n.30) do not support their assertion that 13 additional states favor a broad attorney-client privilege for corporations. None of those cases addresses the question presented as to the propriety of the control group test as furthering the policies of the attorney-client privilege. Although some of them contain dicta favoring a privilege encompassing communications between "agents" of the corporation and counsel, their analyses for the most part blur the distinction between the absolute attorney-client privilege and the qualified work product privilege.

In sum, the decisions of the state courts offer little, if any, guidance for resolution of the question in this case. As the foregoing discussion indicates, to the extent that state law has addressed the question presented, seven states have adopted the control group test, and only one state, California, has adopted the subject matter test. Contrary to petitioners' overstatement (Br. 25), there has not been an "overwhelming" adoption of the subject matter test by the state courts to which this Court should give deference.[30]

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Nor do the lower court opinions in *Ford Motor Co.* v. *O.W. Burke Co.*, 299 N.Y.S.2d 946 (Sup. Ct. 1969), or *Stewart Equipment Co.* v. *Gallo*, 32 N.J. Super. 15, 107 A.2d 527 (Law Div. 1954), which petitioners cite (Br. 25), indicate that New York or New Jersey have "adopted" the subject matter test. The former case held that the privilege applied to a plant employee's report to in-house counsel in anticipation of litigation. However, the case turns entirely upon whether the privilege applies to in-house as well as independent counsel. The court's opinion in no way addresses the status of the employee. At all events, it would appear that the report would be covered by the qualified work product doctrine.

*Stewart Equipment Co.* v. *Gallo*, *supra*, is likewise distinguishable. There, the communication to counsel by a corporate official serving as vice-president and sales manager was held to be within the attorney-client privilege. While the court held that the official in question could not waive the privilege on behalf of the corporation because he was not a director, such an officer could well be viewed as a member of the control group. Since neither *Ford Motor Co.* nor *Stewart Equipment Co.* addressed the relative merits of the control group and subject matter tests, there is no basis for petitioners' claim (Br. 25) that "[t]he decision in *D.I. Chadbourne* reflects the virtually unanimous view of those states that have considered the question."

[30] Contrary to petitioners' further argument (Br. 27 n.31), a federal rule adopting the control group test would not displace the state rules of evidentiary privileges. Under Rule 501 of the Federal Rules of Evidence, federal courts will apply a federal rule of privilege only in federal question cases. Rule 501 further provides that the federal courts will apply the state rule in diversity jurisdiction cases.

## II

## THE WORK PRODUCT DOCTRINE OF *HICKMAN* V. *TAYLOR*, 329 U.S. 495 (1947), DOES NOT PROTECT THE DOCUMENTARY EVIDENCE SOUGHT BY THE INTERNAL REVENUE SERVICE SUMMONS FROM COMPELLED DISCLOSURE BECAUSE THE GOVERNMENT SHOWED AMPLE NECESSITY FOR THE PRODUCTION OF SUCH EVIDENCE

1. As we have pointed out (pages 32–35, *supra*), the Court in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), recognized a qualified privilege for certain materials prepared by an attorney "acting for his client in anticipation of litigation" (*id.* at 508). There, with an eye to potential litigation arising out of a tugboat accident, the defendant's counsel had personally secured written and oral statements from witnesses in preparation for possible trial. The plaintiffs' counsel, in order to prepare for his own examination of these witnesses, sought to discover copies of the signed written statements and the defendant's attorney's detailed resumes of the oral statements. The Court, characterizing these materials as the "work product" of the lawyer, indicated that without a showing of special need, they were privileged from discovery. As the Court stated, "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. * * * And production might be justified where the witnesses are no longer available or may be reached only with difficulty" (*id.* at 511).[31]

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[31] As we have pointed out (pages 32–34, *supra*), the work product doctrine is a qualified privilege that is distinct from the absolute protection afforded by the attorney-client privilege. See *United States* v. *Nobles*, 422 U.S. 225, 238 n.11 (1975). Since *Hickman*, Congress, the courts and the commentators have uniformly viewed the work product doctrine solely as a limitation on pretrial discovery and not as a qualified evidentiary privilege. Thus, Fed. R. Civ. P. 26(b) incorporates much of what the Court held in *Hickman* with respect to pretrial discovery.

In the instant case, the district court observed that "[t]here is, at the outset, a serious question as to whether the work product doctrine is even applicable in a summons enforcement proceeding" (Pet. App. 26a; J.A. 188a). See *United States* v. *McKay*, 372 F.2d 174 (5th Cir. 1967). Contra: *United States* v. *Brown*, 478 F.2d 1038 (7th Cir. 1973); *United States* v. *Amerada Hess Corp.*, 619 F.2d 980, 987–988 (3d Cir. 1980). But even if the work product doctrine is applicable to summons enforcement proceedings, the district court found that the government had shown ample necessity for compelling disclosure (see Pet. App. 28a–30a; J.A. 190a–192a). The court of appeals also rejected petitioners' claim that the documents sought by the summons were protected by the work product doctrine. Although it left undisturbed the district court's finding that the record established ample necessity for compelling disclosure of the summoned material, the court of appeals also expressed the view that "[t]he work-product doctrine of *Hickman* v. *Taylor* * * * is not applicable to administrative summonses issued under 26 U.S.C. § 7602" (Pet. App. 7a n.13).

2. As we acknowledged in our brief (page 10) in response to the petition in this case, the courts of appeals have expressed disparate views as to whether the work product doctrine applies in a summons enforcement proceeding. See *United States* v. *Nobles*, 422 U.S. 225, 247 n.6 (1975) (White, J., concurring). Compare *United States* v. *McKay*, *supra*, 372 F.2d at 176 ("relevancy of the work product privilege enunciated in the *Hickman* case to a proceeding for the enforcement of the Commissioner's summons may well be doubted") with *United States* v. *Brown*, *supra*, 478 F.2d at 1041 ("work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons").[32] Recently, the Third Circuit expressed agreement with *Brown*, although

[32] In *McKay*, the court also held that the appraisal report at issue was in no sense the work product of a lawyer (see 372 F.2d at 177). In *Brown*, the court ruled that the Commissioner had shown sufficient cause to rebut the taxpayer's work product claim on the ground that the document—an attorney's memorandum—was "necessary for a correct determination of the taxpayer's liabilities and that the information contained therein could not be obtained from any other source" (478 F.2d at 1041; see also *id.* at 1039–1040).

it enforced the summons on the ground that the government had made the requisite showing of necessity because the work product in question was of minimal substantive content. *United States* v. *Amerada Hess Corp.*, *supra*, 619 F.2d at 987–988.[33]

3. We do not quarrel with petitioners' submission that, as a matter of law, the work product doctrine is applicable to IRS summons enforcement proceedings. Apart from the decision below, the sole appellate authority to the contrary, *United States* v. *McKay*, *supra*, 372 F.2d at 176, relied upon the analogy of the Commissioner's summons authority to the inquisitorial power of the grand jury. See *United States* v. *Powell*, 379 U.S. 48, 57 (1964); *United States* v. *Bisceglia*, 420 U.S. 141, 147–148 (1975). But the courts of appeals have thus far uniformly held that the work product rule is applicable to a grand jury subpoena.[34] Since there appear to be no unique characteristics or special policies inherent in summons enforcement cases that would foreclose similar application of the work product doctrine in that context, we agree that the *Hickman* rationale and Rule 26(b), Fed. R. Civ. P., can be invoked to resist production of an attorney's work product pursuant to an internal revenue summons.

This is not to say, however, that petitioners' work product claim should defeat enforcement of the summons at issue here. We submit that the district court properly found that "the record establishes ample necessity for compelling disclosure of the summoned material in this case" (Pet. App. 30a; J.A. 192a). Indeed, Upjohn's conduct

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[33] In *In re Grand Jury Investigation* (*Sun Co.*), *supra*, the Third Circuit held that materials similar to those involved here sought by a grand jury subpoena were protected by the work product doctrine, and that the government had demonstrated good cause to overcome that protection with respect to questionnaires and interview memoranda generated by a deceased employee of the corporation because of the government's inability to secure the information from any more reliable source. However, the court deferred ordering production of all of the other materials sought until the government had subpoenaed witnesses before the grand jury (see 599 F.2d at 1228–1233).

[34] See *In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc.*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Investigation* (*Sun Co.*), 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Proceedings* (*Duffy*), 473 F.2d 840 (8th Cir. 1973).

during the audit and its refusal to permit independent corroboration of its assertions concerning the tax consequences of its questionable payments constitute an almost classic case of "ample necessity" and "special need" sufficient to rebut a work product claim under *Hickman* v. *Taylor*, *supra*. Here, petitioners have conceded that there are approximately $3 million of questionable payments that are inaccurately reflected on the corporate books. They nevertheless contend that these payments are not relevant to its federal tax liability, and have refused to permit corporate employees to be questioned by the IRS about these payments. The Commissioner understandably wishes to exercise his own independent judgment in making that determination. All the government is seeking here is the factual data—set forth on the employees' questionnaires and the notes of their interviews—necessary to make that independent judgment that is at the heart of effective enforcement of the tax laws.

Production of such evidence is firmly grounded in the strong public policy favoring enforcement of Internal Revenue summonses. See *United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975). Given this policy and the relevance and importance of the employee questionnaire and interview notes, the government has here shown sufficient need for the evidence and its virtual unavailability from any other source. Some of the employees are no longer with the Company (J.A. 114a–118a). Most of the remaining employees are located throughout the world, some in countries where the government representatives would not have easy access. While Upjohn has offered to transport these employees to a neutral country (J.A. 121a), it has forbidden its employees to discuss with the IRS any payments that Upjohn has concluded are irrelevant[35] (Pet.

[35] With regard to these payments, petitioners are effectively requiring the Commissioner to show probable cause why their records should be made available in spite of this Court's holding in *United States* v. *Powell*, 379 U.S. 48, 57 (1964), that no such showing is necessary for the enforcement of an IRS summons. Furthermore, contrary to petitioners' suggestion (Br. 61), the IRS cannot determine whether the payments in question are covered by Rev. Rul. 77–442, 1977–2 Cum. Bull. 264, until it knows the nature of the payment, as well as for whose benefit the payment was made. Clearly, the IRS need not accept petitioners' characterization of such payments (see pages 23–25, note 15, *supra*).

App. 16a; J.A. 178a). Since the interviews are to be conducted according to ground rules established by Upjohn and Upjohn refuses to allow its employees to discuss certain information, it is clear that absent production of the questionnaires and interviews the information is, as a practical matter, unavailable to the IRS.[36] Furthermore, many of the employees are foreign nationals (J.A. 79a, 125a) who may not be subject to the process of the federal courts. See *Wilson* v. *David*, 21 F.R.D. 217, 221–222 (W.D. Mich. 1957). There is accordingly no basis for petitioner's assertion (Br. 62–63) that the information is available by direct examination of the employees.

Finally, it should be emphasized that approximately three years have elapsed since the questionnaires at issue were sent out and the final Form 8-K was filed. Memories grow cold with the passage of time. It is therefore likely that the employees have forgotten some of the details of the myriad transactions they reported. The questionnaires and interview notes—taken at times more contemporaneous with the years under audit—are a far more accurate source for determining Upjohn's correct tax liability than the employees' present recollection, assuming that they can be located and questioned. Indeed, it is not unrealistic to assume that Upjohn's employees might be less cooperative in responding to direct examination by an internal revenue agent than to a request from a company superior.[37] See *Southern Ry.* v. *Lanham*, 403 F.2d 119, 127–129 (5th Cir. 1968); *Goosman* v. *A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963).

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[36] The case is therefore distinguishable from: (1) *In re Grand Jury Investigation (Sun Co.)*, *supra*, 599 F.2d at 1232, where the government made no effort to secure the testimony of the interviewees, and their unavailability was purely conjectural; (2) *Diversified Industries, Inc.* v. *Meredith*, *supra*, 572 F.2d at 611, where the employees themselves were apparently fully available; and (3) *In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc.*, *supra*, 599 F.2d at 512, where the employees were to be called to testify before the grand jury and the government was only trying to determine beforehand to whom it should grant immunity.

[37] Counsel for petitioner Thomas stated at the hearing that whether Upjohn's employees will testify will depend on the laws of their own countries. He also stated that he was not even sure some of them would testify and that Upjohn would not compel them to do so (J.A. 78a–79a).

Accordingly, the judgment of the court of appeals can be affirmed on the basis of the district court's finding that "the record establishes ample necessity for compelling disclosure of the summoned material in this case" (Pet. App. 30a; J.A. 192a). As the Court stated in *Hickman* v. *Taylor*, *supra*, 329 U.S. at 511–512, in terms that are particularly appropriate in describing the obstacles that the IRS would otherwise face in pursuing its investigation of Upjohn, "production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning." Petitioners' work product claim should therefore be rejected and the summons enforced.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 79-886

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

THE UPJOHN COMPANY AND GERARD THOMAS,
*Petitioners,*

v.

UNITED STATES OF AMERICA AND DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITIONERS' REPLY BRIEF

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October 22, 1980

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## PETITIONERS' REPLY BRIEF

The government's effort to restrict the scope of the attorney-client privilege to be accorded a corporation rests largely upon the premise that the privilege itself is an anachronism that should be given the narrowest possible application. Thus it urges that, if it cannot be demonstrated by proof positive that corporate employees will be less than candid with the corporation's lawyers unless what they say is privileged, the privilege should be denied. It cites the ability of Upjohn's lawyers in this case to obtain information from the corporation's employees at a time when the scope of the privilege was unsettled as sufficient proof that the privilege is not essential. In essence, it urges that, unlike other individuals, corporate employees will willingly volunteer all the facts necessary to obtain legal advice and assistance.

Such an approach to the attorney-client privilege is wholly at odds with four centuries of Anglo-American jurisprudence. *See* 8 Wigmore, *Evidence* § 2290, at 542 n.1 (3d ed. 1961). Moreover, it ignores the principle declared by this Court over 150 years ago that the confidentiality of communications between client and counsel "is indispensable for the purposes of private justice."[1] In urging that communications to counsel be made the subject of examination and publication, the government effectively calls for what this Court has described as "a practical prohibition upon professional advice and assistance."[2] In addition, respondents overlook the fact that their grudging interpretation would not be limited to private corporations, but would also inhibit the flow of informed legal advice to unions, trade associations and even governmental agencies.[3] Accord-

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[1] Chirac v. Reinicker, 24 U.S. (11 Wheat.) 124, 130 (1826).

[2] United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915).

[3] Federal courts have, quite naturally, analogized governmental agencies to corporations, and applied to them the same rules of privilege as are applicable to corporations. *See, e.g.,* Mead Data Central, Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977); Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wash. 1975).

ingly, at the forefront of the issues to be resolved in this case is the intrinsic value of the attorney-client privilege in the administration of justice.

Respondents' own discomfort with their position is suggested by their belated reliance upon two arguments that the scope of the privilege need not, after all, be decided here. Neither of those arguments was made in respondents' brief acquiescing in the issuance of a writ of certiorari. We show below that both of these claims are without substance.

With respect to the work-product rule, respondents now concede that the decision of the court of appeals was erroneous. Nonetheless, they seek to sustain disclosure of attorney work product by the adoption of a standard that would regard mere demand by the government as meeting the requirement of "substantial need." Such a standard is contrary to well-established principles, sweeps away the virtually absolute protection that has long been given to the mental impressions and appraisals of counsel, and emasculates the rule in a wide variety of other important situations involving individuals as well as corporations. Here, as in their effort to restrict the attorney-client privilege, respondents appear to attach greater value to the temporary convenience of this investigation than to the fair and effective administration of justice under the adversary system.

## A. THERE IS NO VALID BASIS FOR RESTRICTING A CORPORATION'S ATTORNEY-CLIENT PRIVILEGE

1. Respondents' first effort to avoid a decision on the scope of the privilege consists of characterizing the communications between Upjohn's employees and its counsel as made "for business purposes, rather than for the purpose of securing legal services." Gov't Br. 21. This contention defies a specific finding made by the magistrate, adopted by the district court and affirmed by the court of appeals:

> Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted

> a factual investigation *to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the Company with respect to the payments.*

Pet. App. 13a (emphasis added). This finding is amply supported by the record, which shows that the inquiry was conducted by Mr. Thomas exclusively in his capacity as the company's attorney, and solely for the purpose of offering legal advice to the company. J. App. 91a. In these circumstances, the communications are, as the court of appeals found, encompassed by the attorney-client privilege.[4]

2. Equally insubstantial is respondents' claim that Upjohn waived the privilege because it disclosed to the IRS certain facts elicited during counsel's investigation. The court of appeals properly dismissed such an argument in a footnote. Pet. App. 7a n.12. The disclosure to the IRS consisted only of a summary of certain facts known to the corporation, *not* of the underlying communications between the employees and counsel. Many of the principal facts elicited during the underlying communications, such as the dates, places and recipients of questionable payments, were not disclosed.

It is well established that a client's disclosure to third parties of "*specific facts* about which he has happened to communicate with the attorney is not a waiver." 8 Wigmore, *Evidence* § 2327, at 638 (3d ed. 1961) (emphasis original). *Accord,* D. McCormick, *Evidence* § 93, at 194 (2d ed. 1972); 2 J. Weinstein & M. Berger, *Commentary on Rules of Evidence for the United States Courts and Magistrates* ¶ 511[02], at 511-4 (1979). Judge Kirkpatrick, who originated the control group test, explained the rule in an earlier opinion in that same case:

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[4] It should also be noted that, contrary to the implication of respondents' brief, many of the communications at issue here were made directly to outside counsel, whose function was unequivocally to provide legal advice. J. App. 93a.

> the protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?", but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

*City of Philadelphia* v. *Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962) (emphasis original). Here, the corporation simply exercised the right, held by any client, to disclose certain facts known to it after first discussing them with its attorneys. Under established authorities, such disclosure does not result in a waiver of the privilege.

A separate ground fully supports the court of appeals' conclusion that no waiver occurred here. Several courts have refused to find a waiver of the privilege where the only disclosure was part of a corporation's voluntary efforts to comply with regulatory requirements. As the Eighth Circuit explained in its en banc decision in *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 611 (8th Cir. 1978):

> As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred . . . . To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers. [Citations omitted.]

*Accord, Byrnes* v. *IDS Realty Trust*, 85 F.R.D. 679 (S.D.N.Y. 1980) (principle not limited to outside counsel); *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368 (E.D. Wis. 1979).

3. Respondents argue that affording the privilege to corporations cannot encourage employees to communicate with counsel because employees are not directly protected, and the company remains free to disclose the information. Gov't Br. 26-32. This argument misconceives the reality and purpose of the corporate attorney-client privilege.

A corporation must depend upon its employees for the information needed to obtain informed legal advice.[5] If employees fear that their communications to counsel may be freely available to adversaries, and thus may result in personal liability or embarrassment, they will inevitably prove uncooperative when information is requested by the corporation and its attorneys. *See* Petr. Br. 35; Br. of Amici N.Y. Comm. on Fed. Courts *et al.* 17-18; Br. of Amicus New England L. Foundation 14-15. A corporation that is entitled to keep employees' communications to counsel confidential will find it in its interest to do so, in order to keep the channels of communication open and to encourage continued candor by employees.[6] More important, a corporation's inability to give

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[5] A client performs several functions in his relationship with an attorney, including communicating facts, receiving advice and acting on that advice. Br. of Amicus Am. Bar Ass'n 10-11. An individual client generally performs all of these functions personally. A corporation, however, must assign these functions to the employees best suited to perform them. By focusing on the decision-making function alone, the control group test fails to take account of the important function performed by the client as provider of the information on which the attorney's advice must be based. *Id. See also,* Note, The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach, 69 Mich. L. Rev. 360, 374 (1970).

[6] As one of the *amici* has emphasized, "experience demonstrates that . . . corporate counsel carefully guard the individual interests of the employee. *See, e.g.,* Handler v. SEC, 610 F.2d 656, 660 n.1 (9th Cir. 1979)." Br. of Amici Am. Coll. of Trial L. *et al.* 13 n.10. *See also,* Dresser Industries, Inc. v. United States, 596 F.2d 1231, 1234 (5th Cir. 1979) (corporation sought to protect employees from potential physical harm resulting from public disclosure of information); SEC v. Lockheed Aircraft Corp., 404 F. Supp. 651, 652 (D.D.C. 1975) (corporation refused to comply with SEC subpoena on grounds, *inter alia,* that information may be prejudicial to employees in question).

employees any assurances of confidentiality will seriously damage the corporation's interest in communicating freely with its employees, and severely limit its ability to gather information for purposes of seeking legal advice. Petr. Br. 35, 39; Br. of Amici Trial L. 13 & n.10.

Respondents seek to avoid these issues by claiming that Upjohn did not obtain the permission of its employees before it assertedly revealed some of the information it obtained from them. Gov't Br. 27. In fact, Upjohn has never revealed the communications with any of its employees. While Upjohn has disclosed summaries of information regarding its activities in various countries, it has never revealed communications from specific employees, nor has it referred to the actions of particular employees. This litigation itself represents Upjohn's continuing effort to shield its employees against disclosure of the confidential communications made by them to the company's counsel.

Finally, this argument does not support limiting the privilege to a so-called control group within a corporation but rather complete denial of the privilege. Ultimate corporate decision-making power is not in the hands of management but in the Board of Directors and stockholders. Accordingly, even members of the control group can have no assurance that higher authority in the corporate hierarchy may not decide to waive the privilege in the corporation's best interests.

4. As petitioners and various amici have shown, the privilege not only encourages candid disclosures by corporate employees, but also encourages corporate managements to engage in more rigorous programs of self-regulation.[7] Respondents dismiss this argument, suggesting that corporations "have little choice" but to engage in thorough self-examination. Gov't Br. 29. Respondents also assert that because corporations may be subjected to penalties and liabilities for their activities,

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[7] Petr. Br. 37-38; Br. of Amicus ABA 15-17; Br. of Amici Trial L. 20 & n.17; Br. of Amici Fed. Courts 17-19; Br. of Amicus U.S. Chamber of Comm. 15-16; Br. of Amicus Fed. Bar Ass'n 18-22.

investigations will be undertaken "because good 'business sense' require[s] it," whatever the scope of the corporation's privilege. *Id.* at 31.

It would follow from this argument that no attorney-client privilege for corporations is needed at all, since it will presumably always make good "business sense" for a corporation to consult with attorneys and to engage in self-regulation, whether its communications are privileged or not. Indeed, the logic of the argument extends far beyond corporations. Other persons involved in commercial or even criminal litigation have a substantial stake in the litigation's outcome and will find that it makes good "sense," business or otherwise, to speak candidly with their attorneys. By the government's reasoning, it is pointless to afford the privilege to *any* litigant since, after all, those in need of legal advice are "likely" to speak frankly to their attorneys in any case.

These considerations illustrate two serious flaws in the government's reasoning. The first flaw is that, contrary to the government's assumption, there are no absolutes in predicting the behavior of litigants, whether corporations or individuals, regarding the degree of candor they will employ in communicating with counsel. The decision is frequently based upon a complex set of considerations, some of which favor disclosure, and others of which militate against it. *See* Br. of Amicus Chamber of Comm. 15 n.23. The corporation's management may be faced with clear indications of impropriety, or merely ambiguous signs or rumors, or the corporation may simply contemplate an internal legal audit without evidence of any violation. The likelihood of harm to the corporation from failure to conduct an inquiry may be great and immediate, or it may be improbable and remote. The existence of the privilege in the conduct of such an investigation is one important factor in this equation. That factor may be negative, creating an incentive against inquiries, or it may be positive, favoring inquiries. The policy behind the attorney-client privilege is to assure an incentive *toward* thorough inquiries, and not against them. Respondents' grudging interpretation of the privilege

will significantly inhibit corporate self-regulation particularly by house counsel, and thus undermine activities strongly in the public interest.

The second error in respondents' argument is equally fundamental: they fail to realize that the privilege is not designed simply to assure the efficient conduct of ligitation, but also reflects considerations of essential fairness. A litigant should not be put to the Hobson's choice of either communicating freely with his attorney and thereby disclosing damaging information to his opponent, or, in the alternative, keeping the information secret and thereby foregoing the informed assistance of counsel. This Court recognized this important principle more than a century ago: "If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic." *Connecticut Mutual Life Insurance Co.* v. *Schaefer,* 94 U.S. 457, 458 (1876). *See also,* 8 Wigmore, *Evidence* § 2291 at 545-54 & authorities cited therein.

5. Respondents argue that affording the protection to communications between employees and a corporation's attorneys might conceal relevant evidence. Gov't Br. 39-43. This argument cannot withstand analysis. The privilege does not limit in any way the ability of an adversary to obtain evidence, since it is applicable only to *communications* to the attorney, and not to the information communicated. *See, e.g., City of Philadelphia* v. *Westinghouse Electric Corp.,* 205 F. Supp. at 831. Without recourse to the shortcut of seizing privileged communications, an adversary can obtain the same information through the use of normal discovery techniques.

The broad powers of discovery given to all litigants, including government investigators, are illustrated by the Federal Rules of Civil Procedure. Rule 33 provides that an officer or agent shall be designated to provide all of the information available to a corporation responsive to interrogatories served by an opposing party. This rule contemplates an inquiry on the

part of the corporation to discover facts known to any of its employees or agents, and disclosure of those facts to the adverse party. Thus, not only does an adversary have access to the witnesses directly, but he can within broad limitations require the corporation to gather the information for him. Rule 33 and numerous other discovery provisions wholly undercut respondents' claim that it is unduly burdensome to require a party to conduct a separate investigation when the opponent is a corporation.

Nor is there any substance to respondents' argument that the subject-matter test will create a "zone of silence" by encouraging corporate employees to communicate only with corporate counsel. Gov't Br. 40-42. To the contrary, the availability of the privilege will maximize the flow of information to corporate management by encouraging candid communications by corporate employees. If abuses occur, they can be readily distinguished from legitimate applications of the privilege. The safeguards adopted by the Eighth Circuit in *Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir. 1978) (en banc), are specifically designed to ensure that the privilege is invoked legitimately.[8] *See* Petr. Br. 21-23.

The communications here in question fall squarely within the scope of *Diversified* and, despite respondents' intimations to the contrary, were plainly legitimate exchanges between attorney and client for purposes of affording legal advice. The

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[8] Contrary to respondents' assertion, petitioners do not "reject the modified subject matter test" of *Diversified.* Gov't Br. 42 n.27. Petitioners recognize that, as with any other legal principle, safeguards are necessary to prevent abuses, and the safeguards suggested by Judge Weinstein and adopted in *Diversified* may serve that purpose. Petitioners also suggest, however, that the precise formulations adopted in *Diversified* may be unduly rigid, and that this Court may prefer in this case to adopt a more flexible approach, perhaps awaiting further developments in the lower courts. Petr. Br. 23. *See also* Br. of Amicus ABA 6 & n.2; Br. of Amici Trial L. 10 n.5.

information was provided to Upjohn's attorneys by corporate employees regarding matters falling clearly within the scope of their employment. The employees acted in direct response to instructions from their corporate superiors. In turn, the corporate superiors acted on the advice of counsel, for the purpose of providing information to counsel upon which legal advice would be based. The communications were held in confidence within the organization.[9] In these circumstances, respondents' belated suggestions of abuse are unpersuasive.[10] Indeed, those suggestions underscore the unjustifiably narrow view respondents take both of the privilege and of the important interests it is designed to serve.

The privilege does not serve to deny evidence to or to handicap an opponent. As noted, all the relevant facts remain discoverable, and often, as is the case here, counsel's previous efforts actually facilitate investigation by an opponent. The application of the privilege — in the case of both a corporation and an individual — merely denies to a litigant any advantage arising from the circumstance that his opponent has consulted counsel.

6. Respondents urge that *Hickman* v. *Taylor,* 329 U.S. 495 (1947), adopted the control group test by implication. The deficiencies of this claim are many and severe. First, respondents' argument is based solely on inferences, unsupported by any holding or even dicta in the case, which was decided two decades before the competing tests were even articulated. Second, this Court specifically disavowed any intention in

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[9] The letter from Upjohn's chairman specifically advised employees that "[t]he subject matter [of the inquiry] must be treated as highly confidential and is not to be discussed with or disclosed to anyone other than Gerard Thomas or individuals he shall designate." J. App. 39a.

[10] It is significant that respondents did not offer such an argument before the court of appeals, the district court or the magistrate, and did not even find the question sufficiently significant to refer to it in their brief acquiescing in the grant of a writ of certiorari by this Court.

*Hickman* " to delineate the content and scope of [the attorney-client] privilege." *Id.* at 508. Third, respondents have, in any event, misread *Hickman.* Their argument amounts merely to this: since *Hickman* concerned disclosure of communications between employees and counsel, and the Court based its holding upon the work-product rule, it must by implication have concluded that the attorney-client privilege was inapplicable. This overlooks the fact that *Hickman* did not involve a corporation at all, and therefore did not pose, even by implication, the question presented here.

More fundamentally, however, in *Hickman* the employees were merely witnesses. The attorneys' investigation did not concern matters falling peculiarly within their expertise or duties as employees. Rather, they happened fortuitously to witness an accident which involved potential liability for their employer. Their position was no different from that of surviving passengers of the barge or casual observers from the shore or a nearby boat.[11] In those circumstances, the communications fell outside all of the various possible tests for the privilege. Respondents' reliance on *Hickman* is thus clearly misplaced.[12]

7. Respondents next attempt to avoid petitioners' argument that state law strongly supports adoption of the subject-matter test by seeking to distinguish certain of petitioners' authorities. Despite respondents' unpersuasive efforts, the

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[11] As pointed out by Amici Trial L., the employees in *Hickman* had interests adverse to those of the employer with respect to the incident in question. Amici Br. 11 n.7. In such circumstances, the privilege had been held not to apply at all to communications between the agent and the employer's attorney. *Id., citing* Becher v. United States, 5 F.2d 45, 49 (2d Cir. 1924).

[12] Respondents suggest that the "scope of employment" test is subject to manipulation, because corporations could always define the duties of employees as including observation of what would otherwise be fortuitous events. Gov't Br. 34-35. These arguments have little substance. The issue is not how a corporation chooses to define its employees' duties, but whether the information in question *in fact* relates to the employees' substantive responsibilities.

simple fact remains that state law policies do preponderantly favor the broader interpretation of the privilege reflected in the subject-matter test.

For example, in *Ford Motor Co.* v. *O.W. Burke Co.*, 59 Misc. 2d 543, 299 N.Y.S. 2d 946 (Sup. Ct. 1969), the defendant sought to subpoena communications between an employee of plaintiff and its house counsel. Before the commencement of litigation, the attorney had investigated the controversy and, pursuant to his request, the employee had provided him with information in the form of a memorandum. The court held the communication to be protected by the attorney-client privilege.[13] Respondents also attempt to dismiss the unequivocal holding in *Stewart Equipment Co.* v. *Gallo*, 32 N.J. Super. 15, 107 A.2d 527 (1954), by arguing that the employee "could well be viewed as a member of the control group." Gov't Br. 45 n.29. Not only did the court make no such finding, but such a finding would have been inconsistent with the court's conclusion that the employee lacked authority to waive the privilege on behalf of the corporation. 32 N.J. Super. at 17, 107 A.2d at 528. Accordingly, he could not have been a member of any control group.[14]

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[13] Respondents argue that this case "turns entirely upon whether the privilege applies to in-house as well as independent counsel." Gov't Br. 45 n.29. However, that question only becomes relevant once the court determines, as it did, that the privilege exists at all.

[14] Similarly unavailing is respondents' attempt to undermine petitioners' suggestion that the Illinois courts are moving toward adoption of the subject-matter test. Gov't Br. 44. In Cox v. Yellow Cab Co., 61 Ill. 2d 416, 337 N.E.2d 15 (1975), the Illinois Supreme Court stated:

> There are many factors relevant to a determination whether a statement given by a corporate employee is entitled to the protection of the attorney-client privilege. (*See, e.g.*, the discussion by the California Supreme Court in *D. I. Chadbourne, Inc.* v. *Superior Court* (1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700.) Among those factors are the purpose for which the statement was required, the understanding by its maker as to that purpose, the extent to which its confidentiality was maintained after it was made and in the course of its transmission to counsel, and others.

Equally unpersuasive is respondents' wholesale dismissal of a number of petitioners' citations. Gov't Br. 44 n.29. While respondents may believe that some of the older state court decisions are less crisply written than more modern opinions, a review of the authorities cited by petitioners will confirm that state law strongly favors a broad application of the attorney-client privilege, such as that offered by the subject-matter test.[15] *See also* Br. of Amicus Fed. Bar Ass'n 26-27. Adoption by this Court of the grudging interpretation urged by respondents would seriously undermine state policies regarding a matter as to which those policies are entitled to great weight.[16]

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(*footnote continued*)

61 Ill. 2d at 420, 337 N.E.2d at 18. As respondents admit, *D.I. Chadbourne* squarely adopted a subject-matter test. Gov't Br. 44-45. The Illinois Supreme Court's failure even to mention the control group test, or Day v. Illinois Power Co., 50 Ill. App.2d 52, 199 N.E.2d 802 (1964), which had purported to adopt that test, is highly significant. Respondents fail to note that Johnson v. Frontier Ford, Inc., 68 Ill. App.3d 315, 386 N.E.2d 112 (1979), which they cite as the latest affirmation of the control group test in Illinois, Gov't Br. 44, had been vacated on September 28, 1979 by order of the Illinois Supreme Court. A certified copy of that order has been lodged with the clerk of this Court.

[15] As shown in petitioners' opening brief, at 24-27, more than a dozen jurisdictions have adopted a broad interpretation of the privilege. It is true that six states have adopted the Uniform Rules of Evidence, which incorporate a control group test, but there is no reason to assume that the issue presented here received special or detailed attention. The adoption by those few states of the Rules provides far less significant evidence of state policies than the individual decisions made in a larger number of jurisdictions.

[16] Respondents' argument, Gov't Br. 45 n.30, that "a federal rule adopting the control group test would not displace the state rule of evidentiary privileges [because] . . . federal courts will apply a federal rule of privilege only in federal question cases [and] . . . the state rule in diversity jurisdiction cases," ignores reality. In determining what to disclose to an attorney, a client must, of necessity, govern his affairs

(*footnote continues*)

## B. THE WORK-PRODUCT RULE PROTECTS FROM DISCLOSURE THE MATERIALS PREPARED BY AND FOR UPJOHN'S COUNSEL

The government now concedes that the court below erred in holding that the attorney work-product rule has no application in proceedings to enforce a summons issued by the IRS under 26 U.S.C. § 7602. Gov't Br. 16, 48.[17] But the government would drain its concession of force by urging the Court to adopt a special, watered-down version of work-product protection for purposes of such proceedings.

The terms of the work-product "protection" proposed by the government would be radically narrower than those provided for in *Hickman* v. *Taylor,* 329 U.S. 495 (1947), *United States* v. *Nobles,* 422 U.S. 225 (1975), and Fed. R. Civ. P. 26(b)(3). The government would have the Court eliminate the virtually absolute protection which attorneys' "mental impressions, conclusions, opinions or legal theories" consistently have been afforded under Fed. R. Civ. P. 26(b)(3). It also urges a standard of "necessity" for the disclosure of other work-product materials that could be met in virtually any case involving a large organization and in every case involving an organization with any overseas employees.

1. The first category of documents that the government contends should be turned over to the IRS consists of the interview notes and memoranda prepared by Upjohn's counsel to record their impressions of witness interviews. J. App. 93a. Such materials have consistently been afforded virtually abso-

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(*footnote continued*)

according to the narrowest rule applicable in litigation in which it might become involved. Since corporations frequently must assume that they may sue or be sued in federal court, the federal privilege will govern their behavior, whether or not they ultimately become involved in federal question litigation.

[17] The government has not disputed that the materials sought by this summons are properly considered attorney work product.

lute immunity from discovery.[18] The Magistrate did not pause to give separate consideration to these materials. Instead, in a single sweeping conclusion, he recommended that all work product be disclosed. J. App. 192a. To sustain that holding, as the government urges, would *sub silentio* eliminate the virtually absolute protection that consistently has been afforded opinion work product.

The principles that led to adoption of the stringent protection for opinion work product are sound and should govern the decision here. As we have shown, Petr. Br. 49-55, this Court recognized in *Hickman* v. *Taylor* that compulsory disclosure of an attorney's notes concerning a witness interview would seriously jeopardize the orderly prosecution and defense of claims:

> Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. . . . The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony would not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

329 U.S. at 512-13. At least in the situation before it, the Court was unable to imagine any possible showing of necessity that could ever justify the disclosure of such materials. *Id.* at 513. *See also United States* v. *Nobles,* 422 U.S. at 252-53 (White, J., concurring).

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[18] *See, e.g.,* United States v. Leggett & Platt, Inc., 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975). *See also* In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977).

The special status of opinion work product is expressly confirmed by the Federal Rules of Civil Procedure. Although Rule 26(b)(3) permits the disclosure of various trial preparation materials upon a suitable showing of need and hardship, it unequivocally instructs the district courts to "protect against disclosure" materials containing "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative . . . ."[19]

Without explanation or discussion, the government would have the Court sweep away a protection basic to the adversary system, which has been recognized by courts on both sides of the Atlantic for many years. *See* Petr. Br. 50-51 & n.56. The government points to no abuses of the opinion work-product rule that would justify such a radical step or call into question the wisdom of *Hickman* v. *Taylor* or Rule 26(b)(3). Accordingly, whatever result it may reach with respect to the Service's assertion of "necessity," the Court should protect the interview notes and memoranda of Upjohn's attorneys from disclosure.[20]

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[19] In explaining this branch of the work product rule, the Advisory Committee on the Rules of Civil Procedure stated,

> [Subdivision (b)(3) of Rule 26] then goes on to protect against disclosure the attorney's mental impressions, conclusions, opinions or legal theories. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories.

4 Moore *Federal Practice* ¶ 26.01[18] (2d ed. 1979).

[20] The protection to be afforded to the opinion work product sought by the summons is not an issue upon which further evidentiary proceedings are required or even would be helpful. The record makes abundantly clear that the notes and memoranda sought by the summons consist of opinions and mental impressions. J. App. 93a. No further showing is required in order to invoke absolute immunity.

2. Rule 26(b)(3) provides that work product (other than opinion work product) may be disclosed only "upon a showing that the party seeking discovery . . . is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The Service has never remotely approached any such showing. Indeed, the summons here, which calls specifically for all work-product materials, was issued at the outset of the Special Agent's investigation, months before any documents were requested or witnesses examined and, accordingly, well before discovery had been initiated, let alone exhausted.

The government's position is based largely upon Upjohn's objections, on grounds of relevancy, to questions put to one witness regarding foreign payments which the Company contended could not conceivably have affected its United States tax liability. Gov't Br. 49-50. But Upjohn's objections are insufficient to establish the unavailability to the Service of "substantial equivalents" of counsel's work product.[21]

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[21] Contrary to the government's contention, Upjohn is not asking that the Service be required to demonstrate probable cause why the summoned records should be disclosed. *See* Gov't Br. 49 n.35. All Upjohn is asking is that the Service utilize the methods created by Congress to resolve a dispute as to relevance, rather than seeking the work product of counsel as a convenient alternative to even presenting the dispute to a court.

The government relies on United States v. Bisceglia, 420 U.S. 141 (1975), for the proposition that production of the work product of Upjohn's counsel "is firmly grounded in the strong public policy favoring enforcement of Internal Revenue summonses." Gov't Br. 49. But there is nothing in *Bisceglia* to suggest that a weakened version of work-product protection should be fashioned for summons enforcement cases, and the result in *Bisceglia* — the sanctioning of John Doe summonses—was in fact modified by Congress because of its concern regarding needless invasions by the Service of privacy interests. *See* Petr. Br. 57 n.68.

Any policy generally favoring enforcement of summonses has, of course, never been considered to be absolute. This Court has consistently recognized that any such policy must give way in the face

(*footnote continues*)

When confronted with such objections, the Special Agent was plainly not without appropriate means to obtain the information he sought. He had only to utilize the tools provided by Congress. He could readily have issued summonses for the witnesses' testimony pursuant to 26 U.S.C. § 7602, and promptly thereafter petitioned the district court for enforcement pursuant to 26 U.S.C. § 7604.[22] Instead, the Special Agent sought a short-cut through the use of counsel's work product. But the desire for such a short-cut hardly constitutes a demonstration of the absence of "substantial equivalents."[23]

The government attempts to bolster its showing of "necessity" by arguing that the Service faced hardships in conducting its investigation. Gov't. Br. 49-50.[24] In the first place, the claimed "hardships" are largely of the Service's own making. With respect to prospective witnesses residing outside the United States, Upjohn agreed to and did give notice to the Service when those persons visited Upjohn's headquarters in Michigan, but the Service did not interview several of them and did not serve summonses for their testimony. Nor has the Service taken full advantage of Upjohn's offer to make these

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(*footnote continued*)

of constitutional rights and countervailing policies recognized by Congress, United States v. Euge, 444 U.S. 707, 711 (1980), and the policy has never been thought to sanction the overriding of other established privileges, Reisman v. Caplin, 375 U.S. 440, 449 (1964) (attorney-client privilege).

[22] The single witness who, on instructions of Upjohn's counsel, declined to answer certain questions put by the Special Agent was, although based abroad, interviewed in the United States. J. App. 77a, 79-80a.

[23] *Cf.* United States v. Coopers & Lybrand, 550 F.2d 615, 621 (10th Cir. 1977) ("[m]ere convenience does not make an item producible under an IRS summons").

[24] It should be noted that factors like those cited by the government would be present in virtually any case involving a large organization and in every case involving an organization with any overseas employees. Accordingly, what the government here is arguing for is, in effect, a broad exclusion from work-product protection for a substantial number of entities.

persons available overseas.[25] Moreover, Special Agents have failed to interview a number of persons interviewed by Upjohn's counsel who are stationed in Michigan. Finally, the Service was provided with timely notice of the possible foreign payments at the time of Upjohn's attorneys' investigation. The Service's own responsibility for any delay in its investigation should preclude its reliance on that fact to demonstrate "undue hardship."

Second, a blunderbuss approach to application of the "necessity" exception is obviously inappropriate. For example, the government does not distinguish between questionnaires and interview notes concerning Upjohn's U.S.-based employees and those concerning its overseas employees. The former, of course, are readily subject to federal court process. Nor does the government seek only the limited portions of the work product of Upjohn's counsel that deal with subjects as to which Upjohn's counsel interposed objections.[26] To the contrary, the government evidently believes that if any work-product materials are not, as it views the situation, conveniently available, *all* such materials must be produced.

It never has been demonstrated that any of the concerns now expressed by the government were, as to any prospective witness, anything more than speculation. The government has never served a single summons to compel the testimony of a single witness, except Upjohn's counsel, and has accepted only to a limited extent Upjohn's continuing invitation to interview many employees, here and abroad, without the necessity of a

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[25] Although the Service interviewed employees in Japan and Hong Kong, it made no effort to interview others in less distant locations, even through use of the Service's own investigators located throughout the world. *See* Petr. Br. 63 & n.77.

[26] Contrary to the government's assertion, Gov't Br. 49, Upjohn has not "forbidden" its employees to discuss certain matters with the Service. All that Upjohn has done is, through its counsel, assert objections to certain of the questions put by the Special Agent to a single witness. Petr. Br. 6.

summons. In similar circumstances, courts have unanimously refused to order access to work-product materials. *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224, 1232-33 (3d Cir. 1979); *In re Grand Jury Subpoena Dated December 19, 1978*, 599 F.2d 504, 512-13 (2d Cir. 1979); *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc).[27]

Because the court of appeals did not consider whether the protection of the work-product rule was overcome in this case by any showing of necessity, the government's concession that the rule does apply to a summons enforcement action requires, at a minimum, that the case be remanded for review of the issue of "necessity" under appropriate standards. However, a remand is not required. In view of the Service's failure to make any credible showing of necessity below, and in order to move this investigation forward, this Court can and should hold that the contested materials are protected against disclosure by proper application of the work-product rule.

Respectfully submitted,

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October 22, 1980

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[27] The authorities relied upon by the government are not to the contrary. Goosman v. A. Duie Pyle, Inc., 320 F.2d 45 (4th Cir. 1963), did not involve work-product materials. Southern Railway v. Lanham, 403 F.2d 119, 126-27 (5th Cir. 1968), involved a written statement taken by a claims agent and was decided under the "good cause" standard formerly embodied in Fed. R. Civ. P. 34, which the court itself said required "something less than the demonstration required to overcome the work product immunity" (citations omitted). Wilson v. David, 21 F.R.D. 217 (W.D. Mich. 1957), also was decided under the good cause standard.

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No. 79-886

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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THE UPJOHN COMPANY, ET AL.,
*Petitioners*

v.

UNITED STATES OF AMERICA, ET AL.,
*Respondents*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

---

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## BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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The American Bar Association, with the consent of the parties, submits this brief *amicus curiae* in support of petitioners.

### INTEREST OF THE AMERICAN BAR ASSOCIATION

This case presents two issues of peculiar significance to lawyers: (1) the scope of the attorney-client privilege as applied to communications made to a lawyer by employees of a corporate client; and (2) the extent

to which a lawyer's work product is subject to administrative discovery. Issues of confidentiality such as these go to the heart of the relationship between lawyer and client, and they bear importantly upon the lawyer's role in the administration of justice. The decision in this case will significantly affect the ability of lawyers to provide responsible, effective legal representation and to give the informed guidance necessary to ensure compliance with the law. It therefore is of manifest importance to the organized bar, and to the legal profession generally, that this case be decided with the views, needs, and responsibilities of the profession in mind.

## SUMMARY OF ARGUMENT

1. "(1) Where legal advice of any kind is sought (2) from a professional legal adviser as such, [the attorney-client privilege covers] (3) the communications relating to that purpose, (4) made in confidence (5) by the client. . . ." 8 J. Wigmore, *Evidence* § 2292 at 554 (McNaughton rev. 1961). Communications made by any person in his capacity as the agent of a client are made "by the client." *Id.* § 2317 at 618. Employees at many levels within the corporate hierarchy, not just those within the corporate "control group," may be authorized to communicate with counsel as agents of the corporation. It follows that communications to counsel made by any corporate employee acting within the scope of his authority as an agent of the corporation are made "by the client." Such communications are privileged where, as here, they satisfy the other requisites of the attorney-client privilege.

The attorney-client privilege appropriately extends to communications made by any employee, no matter

what position he occupies on the corporate organization chart, who has authority (1) to seek advice of counsel, (2) to give information relevant to the rendering of advice, or (3) to receive advice. The narrower "control group" test adopted by the court of appeals is artificial and unwarranted. To deny confidentiality to communications made to counsel by employees outside the "control group" exposes to discovery communications from the employees who are most likely to possess first-hand knowledge of the relevant facts and whose communications with counsel may constitute the essential core of the attorney-client relationship. The "control group" test thus frustrates the attorney-client privilege's central purpose of facilitating and encouraging full disclosure to counsel, and as a consequence that test hinders the ability of counsel to provide effective legal assistance.

2. This Court's prior decisions make clear that evidentiary privileges may be asserted in summons enforcement proceedings. *See Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964). The rationale of the work product doctrine extends to such proceedings; indeed, effective legal assistance with respect to disputed federal tax issues would be virtually impossible if the attorney's work product were to be subject to compelled disclosure to the government upon mere demand. Moreover, since the work product doctrine creates a qualified privilege that may be overcome by a showing of necessity, recognition of that doctrine in summons enforcement proceedings will not impede the government's ability to make inquiry into relevant facts.

## ARGUMENT

### I. THE ATTORNEY-CLIENT PRIVILEGE COVERS THE CONFIDENTIAL COMMUNICATIONS MADE TO COUNSEL BY ANY AGENT OF THE CORPORATE CLIENT

#### A. Communications Made By An Employee Within The Scope Of His Authority As An Agent Of The Corporation Are Made "By The Client"

The attorney-client privilege preserves the confidentiality of communications between lawyer and client. "If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915). *See also Connecticut Mutual Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, 458 (1876). An attorney cannot render sound legal advice or provide effective assistance unless he has thorough knowledge of all relevant facts, including both the actions his client has taken and the information upon which his client has acted. These facts can best, and in many instances only, be learned directly from the client. Confidentiality facilitates, and often may be the necessary prerequisite for, the communication of such facts by the client. Consequently, this Court has long understood that "it is indispensable for the purposes of private justice," *Chirac* v. *Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826), that "the apprehension of compelled disclosure by the legal advisers . . . be removed." 8 J. Wigmore, *Evidence* § 2291 at 545 (McNaughton rev. 1961).

The basic elements of the attorney-client privilege are well understood:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

*Id.* § 2292 at 554. *See also United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

The dispute in this case concerns only whether the communications to counsel that the government seeks to discover were made "by the client." The other requisites for application of the attorney-client privilege all have been met: legal advice was sought from professional legal advisers, Pet. App. B, pp. 12a-13a; the communications in question related to the purpose for which advice had been sought, *id.* at 13a; the communications were made and received in confidence, *id* at 14a; and the privilege has not been waived, Pet. App. A, p. 7a & n. 12.

The question whether the communications were made "by the client" arises in this case because the client is a corporation [1] and the communications, of necessity, were made not by the corporation but by the corpora-

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[1] It is, of course, well-established that the attorney-client privilege may be asserted on behalf of corporate clients. *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). *See also, e.g.*, United States v. Louisville & Nashville R.R., 236 U.S. at 336.

tion's employees. The court of appeals distinguished among employees on the basis of their respective positions in the corporate hierarchy and held that, as a matter of law, communications from some corporate employees, but not from others, are made "by the client." We submit that a communication is made by a corporate client whenever it is made by an employee acting within the scope of his authority as an agent of the corporation, without regard to his position in the corporate hierarchy.[2]

This rule accords with both common sense and the historic scope of the attorney-client privilege. "As

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[2] The rule proposed here is similar to the "subject matter" test articulated in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided vote*, 400 U.S. 348 (1971). In that case, the court held that "an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." 423 F.2d at 491-92. But the requirements of the "subject matter" test that the communication be made at the direction of superiors and relate to the performance by the employee of the duties of his employment, although presumably imposed merely to ensure that the communication is made by the employee in his capacity as an agent, appear unduly restrictive. The attorney-client privilege should be available when an employee communicates with counsel, knowing that it is appropriate and within the scope of his employment to do so, whether or not the communication is made at the specific direction of a supervisor. Nor should the privilege be restricted solely to communications relating to the performance by the employee of his particular job responsibilities; the employee should be able, for example, to make confidential communications respecting the performance by other employees of their job responsibilities. *Cf.* Note, *The Corporate Attorney-Client Privilege in the Federal Courts*, 22 Cath. Law. 138, 149-50 n. 45 (1976).

clients, corporations can communicate to attorneys only through agents." Pet. App. A, p. 4a. And it has long been recognized that the attorney-client privilege covers communications made on behalf of a client by any agent of the client:

> The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege.
>
> This of course includes communications . . . *originating with the client's agent* and made to the attorney.

8 J. Wigmore, *Evidence* § 2317 at 618 (emphasis in original).

Traditional agency doctrine provides no basis for distinguishing, for this purpose, between communications made by a corporation's senior management and those made by its lower-level employees. To the contrary, the knowledge acquired by any employee during the course of his employment is imputed to the corporation. *See Franklin Supply Co.* v. *Tolman,* 454 F.2d 1059, 1070 (9th Cir. 1972); *Bailey* v. *Gulf Ins. Co.,* 389 F.2d 889, 891 (10th Cir. 1968). An admission made by an employee concerning a matter within the scope of his employment may be offered in evidence against the corporation. *See* Fed. R. Evid. 801(d)(2)(D). And the corporation may be held liable for the conduct of any employee acting within the scope of his authority. *See United States* v. *American Radiator & Standard Sanitary Corp.,* 433 F.2d 174, 204-205 (3d Cir. 1970), *cert. denied,* 401 U.S. 948 (1971); *cf. Stand-*

*ard Oil Co. of Texas* v. *United States*, 307 F.2d 120, 127 (5th Cir. 1962). Elementary fairness requires that the corporation's legal advisers must be permitted to receive confidential communications from the same employees concerning the facts upon which corporate liability may be predicated.

Application of the rule proposed here ordinarily will present no difficulty. It may be expected that communications to counsel only rarely will be made by employees acting outside the scope of their authority as agents of the corporation.[3] From time to time cases may arise that present difficulty in determining whether a particular communication to counsel was made by an employee within the scope of his authority as an agent of the corporation. *Cf. Hickman* v. *Taylor*, 329 U.S. 495 (1947).[4] But this is not such a case. Virtually by definition, the communications at issue were made by employees within the scope of their authority as agents

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[3] Communications to in-house counsel on matters relating to the legal affairs of the corporation would appear invariably to fall within the scope of an employee's authority. And once outside counsel has been retained with respect to a matter, any employee would appear to have express or implied authority to make relevant communications to counsel (unless a corporate policy or rule prohibits or restricts such communications).

[4] In *Hickman*, the Court concluded that the testimony of certain employee-witnesses was not protected by the attorney-client privilege. 329 U.S. at 508. But the Court neither explicitly recognized that the witnesses in fact were employees nor treated them as such. The Court's opinion indicates, moreover, that the employer had asserted only the work product doctrine and not the attorney-client privilege. 329 U.S. at 499. In any event, the opinion suggests no reason why counsel should be deprived of the ability to interview in confidence those employees of his corporate client who in the course of their employment have witnessed events that form or may form the basis for claims against the corporation.

of the corporate client.[5] The communications were made at the request of the corporation's general counsel (who also was vice-president and secretary of the corporation), Pet. App. B, p. 12a, and they related to corporate activities for which the employees were responsible or that had come to the employees' attention in the course of, and by virtue of, their employment, *id.* at 12a-13a. The communications were made with the specific objective, moreover, of enabling the general counsel and outside counsel "to determine the nature and extent of the questionable payments [made to foreign officials by the corporation or its subsidiaries] and to be in a position to give legal advice to the Company with respect to the payments." *Id.* at 13a. It follows that these communications were made "by the client" and therefore are privileged.

The court of appeals below resisted this conclusion out of concern that preserving the confidentiality of communications made by lower-level employees would result in a "burden on discovery" and establish a "broad 'zone of silence.' " Pet. App. A, pp. 6a-7a.[6] But the denial of confidentiality to communications between counsel and employees having possession of relevant facts cannot be justified on this ground. The attorney-client privilege appropriately fosters and protects the relationship between lawyer and client, but it does not

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[5] Certain communications were made by former employees. Pet. App. B, p. 13a. It is unclear, however, whether petitioners are claiming the attorney-client privilege with respect to such communications, *see* Pet. App. A, p. 3a, and we do not address those communications here.

[6] The court also was concerned that such confidentiality would "encourage[ ] senior managers purposely to ignore important information they have good business reasons to know and use." Pet. App. A, p. 5a. This purely speculative observation, however, has no apparent factual basis.

bar discovery of the facts. No zone of silence is created by the privilege; it shields communications to counsel but not the underlying knowledge of the corporate client and its employees. All conventional avenues of discovery remain open, including questioning of employees who have personal knowledge of the facts. *See, e.g.,* Note, *The Attorney and His Client's Privileges,* 74 Yale L.J. 539, 546-47 (1965). "[T]he original source of information—the client himself [or its employees] —may always be questioned as to matters within his [or their] own knowledge . . . ." Simon, *The Attorney-Client Privilege as Applied to Corporations,* 65 Yale L.J. 953, 955 (1965). "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Hickman* v. *Taylor,* 329 U.S. at 516 (Jackson, J., concurring).

### B. The "Control Group" Test Adopted By The Court Of Appeals Has No Inherent Logic, And It Is Contrary To The Basic Purpose Of The Attorney-Client Privilege

The court of appeals below restricted the attorney-client privilege to "only those communications made by the so-called 'control group' of the corporation, namely, those officers, usually top management, who play a substantial role in deciding the corporation's response to the legal advice given." Pet. App. A, p. 5a. This "control group" test, which arbitrarily excludes all communications made to counsel by the vast majority of a corporation's employees, has no inherent logic; it is simply an artificial means of narrowing the scope of the attorney-client privilege.

At bottom, the "control group" test reflects a failure to recognize and take into account the separate functions of (1) seeking advice, (2) giving information relevant to the rendering of advice, (3) receiving ad-

vice, and (4) acting upon advice. The "control group" test concentrates on the latter function, that of acting upon advice. It treats only those employees who exercise that function as agents of the corporation for purposes of the attorney-client privilege. But the function of acting upon advice is probably the least likely to involve significant confidential communications to counsel. Determination of the proper scope of the attorney-client privilege requires consideration of the functions of seeking advice, giving information, and receiving advice, all of which are more likely to entail confidential communications.

Employees who are authorized to seek legal advice on behalf of the corporation (and who ordinarily will also be authorized to receive advice from counsel) may or may not ultimately be members of the "control group." For example, in a large corporation an assistant general counsel or middle-level manager may have authority to retain, consult with, and receive advice from outside counsel; yet, beyond evaluating and transmitting to senior management the advice thereby received, he may not "play a substantial role in deciding the corporation's response to the legal advice given." But whether or not the employees authorized to seek and receive advice are members of the "control group," their communications to counsel, and counsel's communications to them, as a practical matter constitute the very core of the attorney-client relationship. Those communications must fall within the scope of the attorney-client privilege if the privilege is to preserve the confidentiality of the relationship between a lawyer and his corporate client.

The attorney-client privilege also must cover communications by all employees having express or implied

authority to give information to counsel relevant to the legal problems with respect to which advice has been sought. To the extent that the "control group" test denies confidentiality to such communications, that test runs contrary to the basic purpose of the attorney-client privilege, *i.e.*, "to encourage clients to make full disclosure to their attorneys." *Fisher* v. *United States,* 425 U.S. 391, 403 (1976). "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel* v. *United States,* 100 S. Ct. 906, 913 (1980). Full disclosure to counsel of all the facts relating to a corporate client's legal problems necessarily entails candid communications between counsel and corporate employees at all levels who by virtue of their employment possess knowledge of such facts.

The rationale of the attorney-client privilege applies without regard to the status within the corporate hierarchy of the employee who communicates confidential information to counsel:

> The main consideration is whether the particular representative of the client, to whom or from whom the communication is made, is involved in rendering information necessary to the decision-making process concerning a problem on which legal advice is sought. One can envision that in some situations, the attorney has to go far down in the ranks; in other instances, the attorney can obtain the necessary information close to the top.

*Duplan Corp.* v. *Deering Milliken, Inc.,* 397 F. Supp. 1146, 1165 (D.S.C. 1974). The objective of full dis-

closure to counsel can be realized, therefore, only if the attorney-client privilege extends to all employees of the corporate client who possess relevant information.

The narrow compass given to the attorney-client privilege by the court of appeals frustrates its central purpose of encouraging full disclosure to counsel. The "control group" test directly inhibits the very communications that counsel would find to be of greatest assistance. "In practice, [the "control group" test] results in protecting only communications of top level executives which fails to take into account the realities of corporate life." *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 608 (8th Cir. 1978) (*en banc*). A corporation's senior executives rarely will be in the best position to inform counsel concerning specific factual details on which legal issues may turn. Firsthand knowledge of the relevant facts usually is possessed by middle-level executives or operating personnel. These are the employees from whom counsel will need to acquire the information upon which advice will be based. Yet the "control group" test exposes the communications made by such employees to discovery and therefore may discourage the corporation from asking those employees to discuss the facts with counsel. In contrast, recognition that the privilege may appropriately cover the communications made by any employee within the scope of his authority as an agent of the corporation "encourages the free flow of information to the corporation's counsel in those situations where it is most needed." *Id.* at 609.

The "control group" test operates indirectly as well as directly to inhibit disclosure of relevant facts to

counsel. "From the lawyer's viewpoint, the underlying policy of assuring a client that his communications will remain confidential will be served only if the lawyer is able to predict, with reasonable reliability, that a particular communication will be held by a court to be privileged." Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 Mich. L. Rev. 360, 375 (1970). "Unless the attorney-client privilege is reasonably predictable at the time of attachment, it fails to serve its intended purpose." Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations,* 65 Iowa L. Rev. 899, 918 (1980). The "control group" test does not satisfy the need for predictability. Under that test, each time an attorney is asked to make or receive communications to or from an employee of a corporate client, he must first inquire into the position, status, and responsibility of the employee in order to determine whether the employee is within the requisite "control group." The answer may not always be clear; the employee may play some role in deciding the corporation's response to legal advice but nevertheless be outside a subsequently determined, judicially defined "control group."[7] Position and title apparently afford little guidance and indeed may affirmatively mislead. *See, e.g., Congoleum Industries, Inc.* v. *GAF Corp.,* 49 F.R.D. 82, 84-86 (E.D.Pa. 1969), *aff'd,* 478 F.2d

[7] The attorney thus is presented with a practical difficulty at the outset. He may be forced to make an initial investigation into a matter having little or nothing to do with the legal issue with respect to which his advice is sought. He may, in effect, be required to give two layers of advice—one as to whether the ensuing communications will be privileged and another on the merits of the legal problem at hand. This can and almost certainly often will occur in situations requiring immediate legal advice on the merits.

1398 (3d Cir. 1973) (holding that corporate vice presidents in charge of production and operations were outside the "control group"). In particular circumstances, uncertainty over the membership of the "control group" could discourage even communications that otherwise might later have been recognized to be privileged.

### C. The "Control Group" Test Discourages Corporate Self-Inquiry And Hinders The Lawyer's Ability To Represent His Client

The full disclosure promoted by the attorney-client privilege serves the important societal goal of "encourag[ing] adherence to the law." Miller, *The Challenges to the Attorney-Client Privilege*, 49 Va. L. Rev. 262, 270 (1963). This is especially true with regard to corporate clients. If information may be imparted to counsel in confidence, counsel is better able to investigate allegations of wrong-doing within the corporation, determine the legal implications of past actions, and advise on how to avoid future violations. *See, e.g., Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. at 1164. The process of corporate self-inquiry is demonstrated by the facts of this case. The communications now sought to be discovered were made to counsel in the course of an investigation that had been undertaken in large part to enable counsel to render advice regarding domestic and foreign laws and regulations covering, *inter alia*, securities, tax, and currency matters. *See* Pet. at 12. An investigation of this kind forms the basis for informed counseling and the rendering of the accurate legal guidance necessary to ensure compliance with the law. But such investigations might not be undertaken at all if the protection of the attorney-client privilege were removed. The "control group"

test, therefore, could seriously undermine the vitality of the socially beneficial practice of corporate self-inquiry.

The "control group" test, moreover, confronts counsel with a painful and unfair dilemma: he either must give advice and provide representation on the basis of inadequate knowledge of the facts, or he must obtain such knowledge at the risk of becoming a discovery tool for opposing parties. The dangers of proceeding without a full understanding of the facts are manifest. The lawyer has an obligation to inquire fully into the corporate actions and other facts that bear upon the advice he has been requested to give. Yet, if the "control group" test applied, the lawyer would need to advise the "control group" (assuming that it can be identified) of the hazards of making inquiries that would fall outside the protection of the attorney-client privilege. As a consequence, he might be constrained to give advice without the benefit of full and candid responses to such inquiries. Such a procedure obviously is undesirable. It does not advance the interests either of the corporation or of society at large for the corporation to be forced to play blindman's bluff with the law.

Furthermore, under the "control group" test the consequences for the lawyer who aggressively presses his inquiries into the facts can be embarrassing in the extreme. His reward for diligence may be that he later is required to disclose to opposing parties communications that may be used in a manner prejudicial to his client. The lawyer may even be called to testify against his client. A practice of that sort would be seriously "demoralizing to the Bar . . . ." *Hickman* v. *Taylor,* 329 U.S. at 516 (Jackson, J., concurring).

There also is an element of unfairness to middle management and operating personnel in the "control group" test. An attorney's investigation may result in communications by employees that reveal possible civil or criminal violations that they may have committed in the course of their employment and for which they may be personally liable. *See, e.g., United States* v. *Wise*, 370 U.S. 405 (1962). Under the "control group" test, the corporation or its counsel could be compelled to disclose all communications made by officers and employees other than senior executives: only communications made by members of the "control group" would be insulated from compelled disclosure. Thus the test unfairly puts different employees on different legal footings with respect to the confidentiality of their admissions to corporate counsel. The knowledge that the government could compel the corporation or its counsel to disclose their potentially incriminating communications almost certainly would dissuade lower-level employees who have information of questionable activities from revealing such information to counsel. As a consequence, the "control group" test could directly frustrate the corporation's efforts to discover the facts and acquire the information that it needs in order to put an end to any unlawful activities and place itself in full compliance with the law.

## II. THE WORK PRODUCT DOCTRINE IS AVAILABLE IN ADMINISTRATIVE SUMMONS ENFORCEMENT PROCEEDINGS

The court of appeals erred in holding that "[t]he work product doctrine . . . is not applicable to administrative summonses issued under 26 U.S.C. § 7602." Pet. App. A, p. 7a n. 13. This Court already has indi-

cated that "the witness may challenge the summons on any appropriate ground." *Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964). More recently, the Court has reiterated that the testimonial obligation imposed by a tax summons remains "subject to the traditional privileges and limitations." *United States* v. *Euge,* 100 S. Ct. 874, 879 (1980). In short, "the work product doctrine *does* have applicability to a proceeding for the enforcement of an Internal Revenue summons." *United States* v. *Brown,* 478 F.2d 1038, 1041 (7th Cir. 1973) (emphasis added).

The court of appeals may have believed that the work product doctrine applies only in actions governed by the Federal Rules of Civil Procedure. *See* Pet. App. A, p. 7a n. 13. If so, that belief clearly was mistaken. The work product doctrine also is available, for example, in criminal cases and grand jury proceedings. *See, e.g., United States* v. *Nobles,* 422 U.S. 225, 238 (1975); *In re Grand Jury Subpoena,* 599 F.2d 504, 509-10 (2d Cir. 1979); *In re Grand Jury Proceedings,* 473 F.2d 840, 842 (8th Cir. 1973).

The rationale of the work product doctrine equally extends to administrative summons enforcement proceedings. This Court's thorough explication of that rationale bears repeating here:

> *Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.*
>
> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work

> with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

*Hickman* v. *Taylor,* 329 U.S. at 510-11 ( emphasis added). The considerations and concerns thus identified by the Court remain present, whether the discovery sought is in a civil action or, as here, in an administrative summons enforcement proceeding.

Indeed, it is difficult to see how a lawyer could be expected to provide adequate representation with respect to disputed federal tax issues in the absence of the confidentiality traditionally afforded by the work product doctrine. Ordinarily, whether the issues are civil or criminal in nature, the lawyer would interview the client (or, in the case of a corporate client, its

employees) and other witnesses; take notes recording statements, observations, impressions, thoughts, and conclusions; write memoranda evaluating the factual and legal strengths and weaknesses of the client's case, assessing potential liability, and, perhaps, considering the advisability of settlement discussions; and may also record his thought processes and the results of his investigations in other ways. Little if any of this necessary spadework could be safely done if the attorney's work product were to be made subject to compelled disclosure upon the mere request of the Internal Revenue Service. Lawyers and their tax clients cannot fairly, and should not, be forced to choose between preparing for trial in the dark and doing so in a fishbowl.

Assertion of the work product doctrine in summons enforcement proceedings does not foreclose or significantly curtail the government's ability to conduct a searching inquiry into the pertinent facts. The Internal Revenue Service has ample authority to secure information from a corporation, its employees, and others who may be in possession of business records or actual knowledge of the facts. Moreover, the work product doctrine itself establishes only a qualified privilege that may be overcome by a showing of necessity. *See Hickman* v. *Taylor,* 329 U.S. at 511-12; Fed. R. Civ. P. 26(b)(3). Thus, the government's legitimate interest in knowing the facts and reviewing the evidence can be given appropriate recognition within the traditional confines of the work product doctrine. *See United States* v. *Brown,* 478 F.2d at 1041. That interest does not require or justify wholesale rejection of the work

product doctrine in administrative summons enforcement proceedings.[8]

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[8] In this case, the district court adopted the magistrate's determination that the government had made a sufficient showing of necessity to overcome the privilege. Pet. App. C, pp. 39a-40a; Pet. App. B, pp. 28a-30a. If this Court concludes that the work product doctrine is available in administrative summons enforcement proceedings, the Court should remand the case to the court of appeals for consideration of petitioners' appeal from the district court's decision on the issue of necessity.

In The

# Supreme Court of the United States

October Term, 1979

No. 79-886

THE UPJOHN COMPANY and
GERARD THOMAS,
*Petitioners,*

v.

UNITED STATES OF AMERICA
and DAVID E. NOWAK, Special Agent,
Internal Revenue Service,
*Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## Brief Amici Curiae on Behalf of the American College of Trial Lawyers and 33 Law Firms in Support of Petitioners

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In The

# Supreme Court of the United States

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THE UPJOHN COMPANY and
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v.

UNITED STATES OF AMERICA
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*Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## Brief Amici Curiae on Behalf of the American College of Trial Lawyers and 33 Law Firms in Support of Petitioners

This brief on the merits is filed with the consent of all parties on behalf of the American College of Trial Lawyers and the law firms whose names are subscribed at the end of the brief.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 600 F.2d 1223 and reprinted at p. 1a of the Petition Appendix. The opinion of the United States Magistrate is not officially reported but is unofficially reported at 41 A.F.T.R 2d 78-796 and 78-1 U.S.T.C. ¶ 9277 and reprinted at p. 9a of the Petition Appendix. The order of the district court adopting the Magistrate's opinion and the order of the district court enforcing the summons are not officially reported but are reprinted at p. 39a and p. 41a respectively of the Petition Appendix.

## JURISDICTION

On December 7, 1979, petitioner filed a timely petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit. On March 17, 1980 this Court granted the petition. Jurisdiction is founded upon 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between attorneys for a corporation and corporate employees where the subject of the communications is a matter about which the attorneys' advice has been sought by the corporation and the communications relate to the performance by the employees of the duties of their employment.

2. Whether the work-product doctrine, developed in *Hickman v. Taylor*, 329 U.S. 495, and its progeny, provides a qualified immunity against disclosure of materials sought by a summons issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602.

## INTERESTS OF THE AMICI CURIAE

The American College of Trial Lawyers is an organization of more than 3,000 lawyers and judges throughout

the United States dedicated to the improvement and enhancement of the standards of trial practice, the administration of justice and the ethics of the trial branch of the legal profession. The 33 law firms whose names are subscribed to this brief are regularly engaged in the representation of corporations and appear as amici curiae with the College because the issues presented by this case fundamentally affect their relationships with their clients and the responsibilities they have to their clients, the administration of justice and the legal profession.

Petitioners and respondents here must necessarily deal with the particular facts of this case and the respective interests of the parties to this litigation. The problems raised by the decision of the court below, however, are much broader in nature than the circumstances giving rise to this particular case, for they put in issue the very nature of the attorney-client privilege in the corporate setting, the applicability of the work-product doctrine to investigative proceedings involving individuals as well as corporations, and the functioning of our adversary system of justice. This brief will focus on the urgent need for the enunciation by this Court of a clear and workable definition of the attorney-corporate client privilege, consistent with the purpose recognized by this Court as underlying the privilege and accurately reflecting the ways in which modern corporations function and are held accountable under the law, and of standards for application of the work-product doctrine which are consistent with the responsibilities and role of counsel in an adversary system of justice.

## STATEMENT OF THE CASE

The facts and proceedings below are fully set forth in petitioners' brief on the merits.

## SUMMARY OF ARGUMENT

### The Attorney-Client Privilege

The policy underlying the attorney-client privilege is to encourage full disclosure of information between clients and their attorneys, thereby enabling attorneys to discharge their professional duties effectively, the adversary system to function fairly, and clients to conform their activities to the law. In narrowly confining the scope of the attorney-corporate client privilege to communications of the client's "control group," the Sixth Circuit herein followed the Third and Tenth Circuits in adopting a test which is fundamentally at odds with the purpose of the privilege because it constricts the flow of information from corporate client to attorney.

The restrictions imposed by the control group test are inconsistent with the principles that govern a corporation's accountability for the acts of its agents and with the manner in which modern corporations seek out and assimilate legal advice. The test is incapable of prospective application because it limits the privilege to the communications of an ill-defined group, the "control group," and because it is subject to unpredictable shifts in application within a single corporation and within the context of a single legal problem. The test deprives society of the benefits of the privilege because it hinders efforts directed toward voluntary compliance with the law by impeding an attorney's ability to render candid and well-informed legal advice to a corporation by direct communication with employees for whose actions the corporation may be liable.

A second standard for the attorney-corporate client privilege, developed by the Seventh and Eighth Circuits, protects an employee's communication having as its subject matter the employee's performance of his duties when the disclosure is made at the direction of a corporate superior for the purpose of securing legal advice for the

company. The "subject matter" test is consistent with the purpose of the privilege because it takes into account the realities of modern corporate management and the principles of corporate accountability and because it is capable of prospective application. The test does not create a broad "zone of silence" as the court below contended since the *facts* communicated to an attorney remain discoverable from the corporation and from those employees in possession of the facts. Only the communication of those facts to the corporation's attorney and the attorney's advice with respect thereto is exempted from discovery. The subject matter test is consistent with sound public policy in that it will encourage corporations to maximize their efforts to comply with the law without diminishing the legitimate discovery rights of other litigants.

**The Work-Product Doctrine**

The court below stands alone in squarely holding that the work-product doctrine, developed in *Hickman v. Taylor*, 329 U.S. 495, and deemed essential to "the orderly prosecution and defense of legal claims" (329 U.S. at 510), is not available as a defense to an administrative summons. The Sixth Circuit's holding is contrary to the reasoning of this Court in *Hickman* and the holdings of several other federal courts; it is contrary to sound policy because it penalizes and, hence, discourages, through preparation of administrative cases; and it unwisely coerces attorneys into becoming witnesses against their clients without even requiring the agency to demonstrate a need to invade materials prepared in anticipation of litigation.

Moreover, the Sixth Circuit's apparent premise for its holding – that the broad-ranging inquisitorial powers of the IRS under 26 U.S.C. § 7602 make the work-product doctrine inapplicable – is defective because it fails to recognize the limitations on that power established by this Court. That premise also ignores the fact that numerous

lower federal courts have held that the doctrine is fully applicable to subpoenas issued by grand juries, whose inquisitorial powers are at least as broad as the IRS's.

The government's administrative interest in minimizing the efforts it is required to expend to obtain the information it seeks are clearly outweighed by the public interest in protecting the ability of attorneys vigorously to represent their clients. If the right to meaningful assistance of counsel is to be preserved in administrative investigations as well as in judicial proceedings, the applicability of the qualified immunity afforded by the work-product doctrine must be sustained.

## ARGUMENT

### I. THE TEST FOR THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE MUST BE PREMISED ON THE PURPOSE UNDERLYING THE PRIVILEGE AND NOT ON ANCILLARY CONCERNS UNRELATED TO THE PURPOSE.

The "wise and liberal policy," *Connecticut Mutual Life Ins. Co. v. Schaefer,* 94 U.S. 457, 458, dictating the protection of attorney-client communications, has been stressed repeatedly by this Court. "If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States v. Louisville & Nashville R.R.,* 236 U.S. 318, 336. *See also Hunt v. Blackburn,* 128 U.S. 464, 470; *Blackburn v. Crawfords,* 3 Wall. 175, 192-93; *Chirac v. Reinicker,* 11 Wheat. 280, 294.

The purpose of the attorney-client privilege is to insure full disclosure between client and attorney; the privilege must be "applied where necessary to achieve its purpose" so that the "ability to obtain informed legal advice will remain unfettered." *Fisher v. United States,* 425 U.S. 391, 402-404. "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States,* ..... U.S. ....., 100 S. Ct. 906, 913.[1]

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[1] The policy articulated by this Court as underlying the privilege has also been recognized by lower courts and commentators. *See, e.g.,* the Comment to Rule 210 of the Model Code of Evidence (*ALI* 1942):

> In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity.

This Court not only has recognized that preservation of the privilege "is indispensable for the purposes of private justice," *Chirac v. Reinicker*, 11 Wheat 280, 294, but also has specified the analytical approach to be followed in resolving any controversy concerning the scope of the privilege. The Court has made clear that, while the privilege is to be narrowly construed, the scope of any test for its application must insure that the purpose underlying the privilege will be achieved. *Trammel*, ..... U.S. at ....., 100 S. Ct. at 913; *Fisher*, 425 U.S. at 403-404. Thus, since the purpose of the attorney-client privilege is to enable the client to obtain legal advice based on the fullest possible understanding of the facts, *United States v. Louisville & Nashville R.R.*, 236 U.S. at 336; *Hunt v. Blackburn*, 128 U.S. 464, 470, the scope of the privilege must be such that it will "encourage clients to make full disclosure to their attorneys." *Fisher*, 425 U.S. at 403.

The privilege has always been available to corporations and other organizations[2] as well as to individuals. *United States v. Louisville & Nashville R.R.*, 236 U.S. 318; *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929; *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).[3] Yet, there are now diverse and con-

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[2] Indeed, the rule adopted by this Court for the application of the privilege to corporations is likely to be applied by the lower courts in the context of other organizations such as government agencies, labor unions, non-profit corporations, associations, partnerships and trusts. *See, e.g. Mead Data Central, Inc. v. United States Dept. of the Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977).

[3] *See also Bell v. Maryland*, 378 U.S. 226, 263 (Douglas, J., concurring); Proposed Federal Rules of Evidence, Rule 503(a)(1), 56 F.R.D. 183, 235 (1973); Uniform Rules of Evidence, Rule 502(a)(1) (National Conference of Commissioners on Uniform State Laws 1974); ALI, Model Code of Evidence, Rule 209(a) (1942). In fact, because of the widespread impact of corporate

flicting views among the federal courts on the scope of the corporate privilege. On the one hand, the court below, along with the Third and Tenth Circuits, adopted the narrow "control group" standard which limits the privilege to communications of employees, usually top management, who are in a position to control the corporation's response to the legal advice received.[4] On the other hand, recognizing that the control group test is not adequate to protect the purpose of the privilege, the Seventh and Eighth Circuits have adopted the broader "subject matter" test which applies the privilege to communications of an employee made at a supervisor's request for the purpose of securing legal advice for the company and relating

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activities and because of the complexity of the laws governing those activities, society has a substantial interest in preserving the privilege where corporate clients are concerned. *See, e.g., A. B. Dick Co. v. Marr,* 95 F. Supp. 83, 101-102 (S.D.N.Y. 1950).

4. *In re Grand Jury Investigation (Sun Company Inc.),* 599 F.2d 1224 (3d Cir. 1979); *Natta v. Hogan,* 392 F.2d 686 (10th Cir. 1968). It is arguable that the Tenth Circuit's finding in this regard is *dictum* since the test was applied without discussion (392 F.2d 692) and was not contested by the parties in the District Court. *Hogan v. Zletz,* 43 F.R.D. 308, 312-14 (N.D. Ok. 1967). Other cases utilizing the control group test include *In re Grand Jury Subpoena Dated December 19, 1978,* 81 F.R.D. 691 (S.D.N.Y. 1978), *rev'd on other grounds,* 599 F.2d 504 (2d Cir. 1979); *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.,* 68 F.R.D. 397 (E.D. Va. 1975); *United States v. IBM Corp.,* 66 F.R.D. 206 (S.D.N.Y. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.,* 50 F.R.D. 117 (M.D. Pa. 1970); *Congoleum Industries, Inc. v. GAF Corp.,* 49 F.R.D. 82 (E.D. Pa. 1969), *aff'd without opinion,* 478 F.2d 1398 (3d Cir 1973); *Garrison v. General Motors Corp.,* 213 F. Supp. 515 (S.D. Cal. 1963); *City of Philadelphia v. Westinghouse Electric Corp.,* 210 F. Supp. 483 (E.D. Pa. 1962), *writ of mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick,* 312 F.2d 742 (3d Cir. 1963), *cert denied,* 372 U.S. 943.

to matters within the scope of the employee's duties.[5] Finally, some lower federal courts have utilized a variety of other formulae, including combinations of the two dominant tests.[6]

The control group test, which was formulated in a misguided effort to identify the employees who "personify"

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[5] *Diversified Industries, Inc. v. Meredith,* 572 F.2d 596, 606 (8th Cir. 1978) *(en banc)*; *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970) *(per curiam), aff'd per curiam without opinion by an equally divided court,* 400 U.S. 348, *reh'g. denied,* 401 U.S. 950. Both the Seventh and Eighth Circuits require, *inter alia,* that the employee's communication be made at the direction of his superior. If applied literally, this requirement would impose a cumbersome and unnecessary step in the process by which corporations obtain legal advice and may interfere with the ability of the attorney to secure the information which is essential to insure that the advice the corporation receives is sound. *See* Parts II and III of this Brief, *infra.* The privilege should attach so long as the communication relates to matters within the scope of the employee's duties and is made to facilitate the rendition of legal advice to the corporation.

Other cases utilizing the subject matter test include *In re Grand Jury Subpoena Dated July 13, 1979,* 478 F. Supp. 368 (E.D. Wis. 1979); *In re D.H. Overmyer Telecasting Co., Inc.,* 470 F. Supp. 1250 (S.D.N.Y. 1979); *In re Ampicillin Antitrust Litigation,* 81 F.R.D. 377 (D.D.C. 1978); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.,* 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd,* 534 F.2d 330 (7th Cir. 1976); *Hasso v. Retail Credit Co.,* 58 F.R.D. 425 (E.D. Pa. 1973); *Panduit Corp. v. Burndy Corp.,* 172 U.S.P.Q. 46, 47 (N.D. Ill. 1971).

[6] *Perrignon v. Bergen Brunswig Corp.,* 77 F.R.D. 455 (N.D. Cal. 1978); *Hercules Inc. v. Exxon Corp.,* 434 F. Supp. 136 (D. Del. 1977); *Burlington Industries v. Exxon Corp.,* 65 F.R.D. 26 (D. Md. 1974); *Duplan Corp. v. Deering Milliken, Inc.,* 397 F. Supp. 1146 (D.S.C. 1974); *Eutectic Corp. v. Metco, Inc.,* 61 F.R.D. 35 (E.D.N.Y. 1973).

a corporation, appears to have been based on a misunderstanding of the record and decision in *Hickman v. Taylor,* 329 U.S. 495.[7] It was adopted in contravention of the well-established rule that corporate clients could speak confidentially to their attorneys through authorized representatives, irrespective of the corporate rank of the representatives. *E.g., Zenith Radio Corp. v. Radio Corp. of America,* 121 F. Supp. 792, 795 (D. Del. 1954); *United States v. United Shoe Machinery Corp., supra,* 89 F. Supp. at 361; 8 Wigmore, *Evidence,* § 2317, p. 618 (McNaughton rev. ed. 1961).

Moreover, the courts adopting the control group test have failed to apply the functional analysis specified by this Court in *Fisher* and *Trammel.* Instead of focusing on the need to fashion a rule which insures that the purpose

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[7] The opinion in the original control group case, *City of Philadelphia v. Westinghouse Electric Corp.,* 210 F. Supp. 483, indicates that its conclusion was influenced by *dictum* in *Hickman v. Taylor,* 210 F. Supp. at 485. In *Hickman,* however, this Court specifically *declined* "to delineate the content and scope of the [attorney-client] privilege," 329 U.S. at 508, and held only that "the privilege does not extend to information which an attorney secures from a witness . . .," 329 U.S. at 508. The employees who were interviewed in *Hickman* had filed claims against their employer relative to the accident at issue in the case. *Hickman v. Taylor,* Record at 70a. While communications of a client's agent or representative are generally within the privilege (8 Wigmore, § 2317, p. 618), the privilege does not apply when the agent's interests are adverse to his principal, as they were in *Hickman. Becher v. United States,* 5 F.2d 45, 49 (2d Cir. 1924), *cert. denied,* 267 U.S. 602. The opinion in *Hickman* does not suggest that the Court meant to abrogate the privilege with respect to communications between a corporation's attorney and corporate employees possessing relevant factual information who are not members of the corporation's "control group".

of the privilege will be achieved when applied to corporations, the court below, and other courts adopting the control group test, have restricted the privilege based on perceived concerns unrelated to its purpose.

The control group test was adopted by the court below on the basis of the expressed concern that, unless the more restrictive test for application of the privilege were adopted, corporate managers would be encouraged to remain ignorant of "unpleasant facts which they should know." 600 F.2d at 1227. The Sixth Circuit's assertion is unjustified and unsupported.[8] In addition, when injected into an analysis of the scope of the attorney-client privilege, such concerns needlessly distort the analysis and erode the privilege to the detriment of its purpose.[9] By focusing upon the person with whom the attorney communicated rather than why the communication occurred, the control group test "inhibits the free flow of informa-

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8. In fact, application of the control group test is likely to restrict top management's knowledge of "unpleasant facts" because one of the best tools management has available to it to ferret out all relevant facts is the corporation's lawyers. If these lawyers are unable to investigate the facts under the protection of the attorney-client privilege, they will, as a practical matter, be precluded from keeping top management well-informed. *See* Parts II & III of this Brief, *infra*.

9. Such concerns are addressed appropriately in the context of developing case law respecting the duties of corporate officers and directors. The courts have not been hesitant to respond to claims seeking to interpret expansively the obligations of officers and directors. *See, e.g., United States v. Park*, 421 U.S. 658, 670-673 (Federal Food, Drug, and Cosmetic Act imposes upon corporate supervisors an affirmative duty to seek out and remedy violations and a duty to implement measures to insure that violations do not occur.) *See also, Gould v. American-Hawaiian Steamship Co.*, 535 F.2d 761 (3d Cir. 1976); *Escott v. Barchris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968) (directors personally liable for negligence in connection with false or misleading statements or omissions in proxy solicitations materials and registration statements.)

tion to a legal advisor and defeats the purpose of the attorney-client privilege." *Diversified Industries Inc. v. Meredith,* 572 F. 2d 596, 609 (8th Cir. 1978). Indeed, in adopting the control group test, the Third Circuit conceded that it "affords a corporation the minimum of protection. Although many have argued that the test's protection is inadequate, no one yet has criticized it as overly generous." *In re Grand Jury Investigation (Sun Company, Inc.),* 599 F.2d at 1235.[10]

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[10] The Third Circuit asserted that a broader privilege is unnecessary to encourage candid communication between the lawyer and lower level employees based on its view that the confidentiality afforded such communications would be "illusory" because of the possibility of waiver of the privilege by the corporation. *Sun Company, supra,* 599 F.2d at 1235.

The "waiver" theory as a basis for determining the scope of the privilege is not persuasive. First, the attorney-client privilege is seldom waived. Second, to the extent that the Third Circuit's assertion may have been prompted by a concern that corporate counsel will not properly discharge their responsibilities to individuals, such concern is unfounded. In fact, experience demonstrates that the opposite is true and that corporate counsel carefully guard the individual interests of the employee. *See, e.g., Handler v. SEC,* 610 F.2d 656, 660 n. 1 (9th Cir. 1979). Indeed, the control group test may exacerbate the problem of the individual's rights since, under the test, factual inquiries will be made by corporate superiors who will not be guided by a code of professional conduct in dealing with lower level employees.

Finally, the Third Circuit's conclusion that the same amount and quality of information will be available to the attorney under the control group standard as under the subject matter test focuses solely upon an employee's willingness to communicate with the corporate attorney and ignores the fact that the uncertain and narrow scope of the test significantly increases the likelihood that the corporation will decide against permitting any communication between attorney and employee to take place in the first instance. See Parts II & III of this Brief, *infra.*

As a consequence, the control group test should not be sustained. Rather, as *Trammel* and *Fisher* teach, the test for application of the privilege to corporations and other organizations must be designed to effectuate the purpose of the privilege.

## II. IN ORDER TO ASSURE FULL DISCLOSURE OF INFORMATION BETWEEN CORPORATE CLIENTS AND ATTORNEYS THE TEST ADOPTED TO DEFINE THE SCOPE OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGE MUST BE CONSISTENT WITH THE MANNER IN WHICH CORPORATIONS ARE HELD ACCOUNTABLE UNDER THE LAW AND THE WAYS IN WHICH CORPORATIONS FUNCTION.

A corporation is an artificial being. It has no means of acting or knowing independent of its agents. In *Philadelphia, Wilmington & Baltimore RR. v. Quigley*, 21 How. 202, 210, this Court recognized that axiom and the corresponding rule that corporations and organizations may be held accountable for the acts of their agents. Thus the doctrine of *respondeat superior* provides the basis for holding corporations and other organizations accountable to the persons and entities with which they deal. *Philadelphia, Wilmington & Baltimore R.R. v. Quigley*, 21 How. 202; *Lake Shore & Michigan Southern Ry. v. Prentice*, 147 U.S. 101; *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481; *United States v. A&P Trucking Co.*, 358 U.S. 121, 125.[11]

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[11] The doctrine of *respondeat superior* is clearly not confined to corporations, but is applicable to the entire spectrum of master-

Since a corporation may be held accountable for the acts and knowledge of lower-level employees, the corporation's attorney must be able to get facts directly from, and give legal advice directly to, such employees. Legal advice on liability -- and legal advice on preventive steps to avoid liability – can only be formulated and implemented through candid communication between the lawyer and the specific employee who creates the existing or potential legal risk. By restricting the privilege to communications between "top management" of a corporation and its attorneys, the narrow control group test clearly impedes this essential communication between the attorney and the corporate employee directly involved in the matter about which legal advice is sought. The test totally ignores the fact that legally binding acts and decisions take place throughout the corporate structure and that legal advice is, therefore, required by, and the facts on which that advice is based must be obtained from, individuals at all levels of the corporate structure. In contrast, the subject

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servant relationships. *See* 1 Restatement of Agency 2d, § 220 (1958). As such, the doctrine and the analysis of this Brief are not limited to corporations but are pertinent to the broad range of organizations and individuals who employ others to act on their behalf. Each of these organizations and individuals may be held criminally and civilly liable for the acts and knowledge of persons with whom they have a master-servant relationship. This principle was expressly recognized by this Court and the Congress in drafting the 1975 amendment to Federal Rule of Criminal Procedure 16(a)(1)(A) which provides for discovery by a defendant who is a "corporation, partnership, association or labor union" of grand jury testimony of witnesses who were, at the time of their testimony or the offense, officers or employees of the defendant organization.

matter test not only is geared to the purpose of the attorney-client privilege recognized by this Court but also is consistent with the manner in which corporations are held accountable under the law because it permits direct confidential access to those persons having knowledge of facts affecting the corporation's legal obligations.

The control group test also fails to take account of the ways in which modern corporations are organized and operate, and how they seek, assimilate and act upon legal advice. The Sixth Circuit's opinion is based upon the fundamental misconception that there is a definable "control group" in every corporation which is responsible for corporate action based upon legal advice. Indeed "it is only the senior management," the court below said, "which can be said to possess an identity analogous to the corporation as a whole." 600 F.2d at 1226. This view of the way corporations function gives undue emphasis to the legal fiction of the corporate entity and is contrary to the teaching and experience of authoritative corporate analysts who find that decisionmaking in today's corporation is decentralized.[12] As a practical matter, principal corporate executives are ordinarily not involved in the day-to-day operations of the corporation which may be the subject of legal

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12. A recent empirical study of manufacturing organizations found that decentralization is the most common organizational philosophy, not only in large, highly-diversified companies but also in relatively homogeneous businesses with smaller sales volumes. Vancil, *Decentralization: Managerial Ambiguity by Design* (Financial Executives Research Foundation 1979) at 1, 3, 25. The author concludes (*id.* at 25):

> If decentralization was a managerial invention in 1920, it was an articulated philosophy by 1950, a reorganizational trend by 1960, and a universal practice by 1970. Today, the issue for a manufacturing corporation of any size is not whether it should decentralize, but how much.

inquiry and advice.[13] In the decentralized decision-making which characterizes modern corporations, responsibility for corporate action may be delegated not only to divisions and departments, but also to lower level employees, such as contract administrators, and purchasing and sales personnel, who act for and bind the corporation in its relations with other parties.[14] Even when the ultimate decision is made by a corporate executive, preliminary legal consultation and analysis is frequently and necessarily delegated to subordinate personnel.[15]

Counsel should not be confronted with the dilemma inherent in the control group test of either advising the client without knowledge of all relevant facts, or of obtaining the necessary information from the client's agents and employees at the risk of having to divulge it to an adverse party. *Diversified Industries, Inc. v. Meredith*, 572

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13. *See, e.g., Modern Management, Issues and Ideas*, D.R. Hampton (ed.), Dickenson Pub. Co. (1975); Uyterhoeven, *General Managers In The Middle*, 50 Harv. Bus. Rev. 75 (1972); Vroom, *A New Look At Managerial Decision Making*, Organizational Dynamics-AMACOM (Spring 1973).

14. *See e.g.*, Stieglitz and Janger, *Top Management Organization in Divisionalized Companies*, Conference Board, Studies in Personnel Policy No. 195 (1965).

15. While a variety of models currently exist for corporate decision-making, nearly all stress a decentralized format for at least some of the important functions which characterize a diversified organization. Johnson, *Administrative Structure*, Supervisory Management 28, 29-31 March 1974; Drucker, *New Templates for Today's Organizations*, 52 Harv. Bus. Rev. 45 (1974); Goggin, *How the Multidimensional Structure Works at Dow Corning*, 52 Harv. Bus. Rev. 54 (1974); Sim, *Decentralized Management of Subsidiaries and Their Performance*, 17 Management Int'l Rev. 45 (1977); Sharon, *Decentralization of the Capital Budgeting Authority*, 25 Management Science 31 (1979); *End of the Era for Giant Computers*, 34 Int'l Management 33 (1979); Vancil & Lorange, *Strategic Planning in Diversified Companies*, 53 Harv. Bus. Rev. 81 (1975).

F.2d 596, 608-609 (8th Cir. 1978); *In Re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 385-387 (D.D.C. 1978); *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 145-146 (D. Del. 1977); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164-1165 (D.S.C. 1974). The Eighth Circuit identified this critical deficiency in the control group test in its decision in *Diversified Industries*, 572 F.2d at 608-609:

> The attorney dealing with a complex legal problem "is thus faced with a 'Hobson's choice.' If he interviews employees not having the 'very highest authority', their communications to him will not be privileged. If, on the other hand, he interviews *only* those with the 'very highest authority,' he may find it extremely difficult, if not impossible, to determine what happened." [citation] Thus, the control group test inhibits the free flow of information to a legal advisor and defeats the purpose of the attorney-client privilege.

The suggestion in the opinion below that the control group test is necessary to avoid the possibility of counsel being the "exclusive repository of unpleasant facts" leading to the creation of a broad "zone of silence," 600 F.2d at 1227, is unwarranted and ignores the reality that the subject matter test protects only communications with counsel and does not prevent discovery of the underlying facts known by corporate agents and employees. *See, e.g., Grant v. United States*, 227 U.S. 74, 79; *Balistrieri v. O'Farrell*, 57 F.R.D. 567 (E.D. Wis. 1972); *Standard Pressed Steel Co. v. Astoria Plating Corp.*, 162 U.S.P.Q. 441, 13 F.R. Serv. 2d 844 (N.D. Ohio 1969); *Lance, Inc. v. Ginsburg*, 32 F.R.D. 51 (E.D. Pa. 1962); *City of Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830 (E.D. Pa. 1962). In *Westinghouse*, 205 F. Supp. at 831, the court explained:

> [T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing

> and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?," but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.[16]

The subject matter test, focusing upon attorney-employee communications relating to the scope of the employee's duties and made for the purpose of rendering advice to the corporation, has been delineated carefully to accomplish the purpose of the privilege while guarding against obstruction of discovery efforts. *See generally* 2 Weinstein & Berger, *Weinstein's Evidence*, ¶ 503(b)[04], p. 503-47 (1979). Moreover, the burden of proof is on the corporation asserting the privilege to establish each element of the privilege and other generally applicable requirements of the attorney-client privilege remain operative under the subject matter test. *See* the eight requirements listed at 8 Wigmore, § 2292, p. 554. Thus, contrary to the Sixth Circuit's assumption, under the subject matter

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[16] In civil cases, the subject matter test does not change the fact that the full panoply of discovery devices made available by the Federal Rules of Civil Procedure may be used by parties opposing a corporate client to discover facts which may also have been communicated to counsel. Thus, an adversary may submit interrogatories to the company under Civil Rule 33 which will require the company to respond with the collective knowledge of its agents and employees; the adversary may seek production of corporate documents under Civil Rule 34; and the adversary may depose employees under Civil Rule 30.

In short, an adversary party is in the same position, no better and no worse, than if the corporation had not sought legal advice with respect to the matter at issue. The only "burden" the privilege imposes is that of requiring each party to do its own discovery.

test the attorney-client privilege is applied to corporations only "where necessary to achieve its purpose." *Fisher*, 425 U.S. at 403.

The control group test recognizes the existence of a privilege for corporate clients but strips it of meaningful content by requiring top management to act as a funnel through which all facts and legal advice must flow. Under the control group test, fact-finding on which legal advice is to be premised either will not be performed or will be performed by corporate managers who do not fully appreciate what facts to look for or the legal significance of facts brought to their attention. The control group test places attorneys who represent corporations and other organizations in an untenable professional position. It discourages corporations from seeking legal advice in the first instance;[17] it requires attorneys to give legal advice based on inadequately developed facts filtered through senior management;[18] and it prevents attorneys from communi-

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17. One commentary concludes that, under the control group test, corporate managers will frequently decide not to seek a legal opinion since control group members will be unable to spare the time to do the factfinding prerequisite to the rendition of legal advice and they will not want to take the disclosure risks entailed in having legal counsel do the factfinding. *Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1292 (1979).

18. The importance of thorough factual development as a predicate to the giving of legal advice is illustrated by a number of this Court's recent opinions in the antitrust field which have incorporated extensive factual analyses. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1; *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36; *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602; *United States v. General Dynamics Corp.*, 415 U.S. 486.

cating legal advice directly to lower level employees so as to insure that the advice is understood and applied.

## III. IN ORDER TO ASSURE FULL DISCLOSURE OF INFORMATION BETWEEN CORPORATE CLIENTS AND ATTORNEYS THE TEST ADOPTED TO DEFINE THE SCOPE OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGES MUST BE CAPABLE OF PROSPECTIVE APPLICATION.

The rationale of the privilege, that it induces disclosures "which might not have been made absent the privilege," *Fisher*, 425 U.S. at 403, presumes knowledge at the time the communication is made that it will be accorded protection. Under the control group test, however, neither counsel nor the client will be able to ascertain with certainty at the time a communication is made whether it can be protected. Indeed, the test is so uncertain as to make prospective determination of its application impossible.

The decision of the court below demonstrates the definitional problems presented by the control group test. While acknowledging that communications of "top management" qualify for protection under the test, the Sixth Circuit declined to rule outright that Upjohn's chairman, vice chairman, and president were members of its control group. Rather, the court found it necessary to remand the case for the determination of that question. Nothing illustrates more vividly the predicament of corporate counsel attempting to advise a client with respect to the confidentiality of communications from employees than the Sixth Circuit's reluctance to commit itself to a definite answer on this question.

Uncertainty of the type demonstrated by the opinion of the court below has marred the operation of the control

group test in the courts since its inception.[19] Eighteen years after its development, there is no consensus as to whether the test is static or flexible, *i.e.*, whether "control group" denotes a single immutable set of individuals within each corporation or whether the identity of "control group" members may shift within a single corporate organization and even within the context of a single legal problem. Corporate attorneys frequently are confronted with situations in which they are asked to investigate what initially appears to be a legal problem confined to one division or office of the company but which, upon careful investigation, is found to have company-wide implications. Communications at the initial stages of legal fact-finding between counsel and personnel from the division or office in which the problem was first recognized may be essential to the legal advice ultimately given to the corporation and should, therefore, be entitled to as great a degree of protection as communications subsequently made by corporate personnel occupying positions of company-wide responsibility. However, under the control group test the attorney in this situation is unable to advise his clients with any certainty that such communications will be privileged.

By the very nature of the control group test, its application cannot be determined *except* on an after-the-fact basis. The test virtually compels conscientious corporate counsel to disclose, at the time a request for legal advice is initiated, that they can give no assurances as to which communications ultimately will be privileged if fact-finding is pursued. Such disclosure will undoubtedly cause

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19. 2 Weinstein & Berger, *Weinstein's Evidence* ¶503(b)[04] at 503-43 (1979); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement,* 91 Harv. L. Rev. 464, 474 (1977); Note, *Evidence – Privileged Communications – The Attorney-Client Privilege In The Corporate Setting: A Suggested Approach,* 69 Mich. L. Rev. 360, 373 (1970).

clients to behave as if the privilege will not attach, resolving the uncertainty by not fully disclosing relevant information. Hence, the quality of legal advice which ensues will suffer. In short, the control group test cannot promote a full and candid flow of information from corporate client to attorney since it reinforces, rather than removes, "the apprehension of compelled disclosure." 8 Wigmore, § 2291, p. 545.

The subject matter test comports with the purpose of privilege because it enables clients and attorneys to predict in advance, with the necessary degree of certainty, what communications will be privileged. Instead of using an ill-defined concept such as "control group," the test considers whether an employee, irrespective of rank, made a disclosure for the purpose of aiding the corporation to obtain legal advice and whether the disclosure related to the scope of his employment, concepts familiar to judges and attorneys and, therefore, capable of prospective application.

## IV. UNNECESSARY AND ARTIFICIAL RESTRICTIONS ON THE SCOPE OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGE WILL ONLY SERVE TO IMPEDE VOLUNTARY COMPLIANCE WITH THE LAW BY CORPORATIONS.

Regulatory activity affecting corporations and other organizations has increased geometrically in the past decade. This growth is evidenced by the rapid increase in the number of regulatory agencies,[20] regulations, and regula-

[20] Twenty new federal regulatory agencies were established in the ten-year period from 1970 to 1980, the largest growth in number of federal regulatory agencies in any decade. Chilton, *A Decade of Rapid Growth in Federal Regulations*, Center for the Study of American Business, Washington University (March 13, 1979), *as reprinted in* Hearings Before The Committee on Governmental Affairs, United States Senate, 96th Cong., 1st Sess., on S. 445 and Title V of S. 2, May 23 and June 15, 1979, at 84, 86.

tory statutes. The regulations being promulgated by the federal government today, as well as those promulgated by state and local governments, are increasingly inscrutable to the layman.[21] They are ever more complex and detailed in language and application, affecting every level of operations within a business enterprise.[22]

In this highly developed regulatory environment, the skill of corporate attorneys, acting as counselors and advisors, is indispensable to voluntary compliance by corporations with the law. Governmental agencies admit that they lack the manpower required to enforce the multifarious laws and regulations falling under their jurisdiction and that they are dependent upon voluntary compliance efforts of corporations, aided by knowledgeable, responsible and well-informed legal advisors, to achieve such enforcement.[23]

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21. In setting out to study the question of how federal regulations affect the manufacturing phases of the iron and steel industry, the Council on Wage and Price Stability recently found that the regulatory agencies themselves could not offer any guidance as to which regulations were applicable. Council on Wage and Price Stability, *Catalog of Federal Regulations Affecting the Iron and Steel Industry*, (Dec. 1976) at v.

22. In reviewing how a single agency, the Occupational Safety and Health Administration (OSHA), affects a single industry, the Council on Wage and Price Stability stated, "OSHA tells the iron and steel industry what its ladders must look like, what its factory workers must wear, where and under what conditions various things must be stored, what kind of fire extinguishers must be used . . . ." *Catalog of Federal Regulations, supra* n. 21, at iv-v. Clearly, compliance with regulations of the type referred to by the Council may not be ascertained by consulting with "senior management" alone.

23. *E.g.*, Shenefield, *Compliance Programs as Viewed from the Antitrust Division*, 48 Antitrust L.J. 73 (1979) (hereinafter "Shene-

In response to the complex of regulation which envelops them, corporations have been calling upon their attorneys to do more than simply advise management with respect to regulatory developments and the interpretation of those developments. Increasingly, corporations and their counsel have turned to comprehensive and sophisticated programs for ensuring that regulatory directives are carried out in the particular circumstances of the activities engaged in by the corporation, at whatever level those regulatory directives may be operative, from the boardroom at corporate headquarters to the broom closet at the company's smallest and most remote plant. These salutary programs require corporate attorneys to render prescriptive as well as proscriptive advice and to do so with reference to the particular facts and circumstances of the client's operations. Such programs fall under the broad category of voluntary compliance efforts.

In addition to the ongoing compliance efforts of corporations in federal taxation matters, corporations use such voluntary compliance programs with frequency in

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field") ("the private bar is the front line of antitrust enforcement") (Mr. Shenefield, now Associate Attorney General, was the Assistant Attorney General in charge of the Justice Department's Antitrust Division); Weiss, *The EPA Tries to Woo Business*, Dun's Review (April 1978) (reporting comments of Environmental Protection Agency Administrator Douglas Costle). *See also* Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 Bus. Law. 901, 913-914 (1969) (private attorneys are the "primary agents of law enforcement" with respect to "[s]ecurities law (both federal and state), corporate tax, antitrust law of all kinds, utilities regulation . . . .").

the areas of antitrust,[24] environment,[25] and securities.[26] The architects and proponents of such programs stress that they require a free and candid flow of information between the corporate attorney and all levels of both management and non-management personnel whose duties may be affected by the regulations with respect to which advice or compliance counseling is sought.[27]

Many voluntary compliance programs are initiated in the absence of either the threat of potential litigation or any suspicion of wrongdoing.[28] Many have been integrated

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24. Ellis, *Preventive Antitrust* (ABA National Institute 1979); Forrow, *The Corporate Law Department Lawyer: Counsel to the Entity*, 34 Bus. Law. 1797, 1824 (1979); Shenefield, *supra* n. 23; Anderson, *Effective Antitrust Compliance Programs and Procedures*, 18 Bus. Law. 739 (1963); Hale, *Antitrust Audits*, 1 Corp. Prac. Com. 17 (1959).

25. Forrow, *supra* n. 24, 34 Bus. Law. at 1805; Weiss, *The EPA Tries to Woo Business*, *supra*, n. 23 at 87.

26. *What the SEC Expects From Corporation Lawyers*, Fortune, Oct. 23, 1978, at 143; Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 Bus. Law. 5 (1979); Kennedy & Simon, *An Examination of Questionable Payments and Practices*, Praeger Publishers, New York (1978).

27. *E.g.*, Shenefield, *supra* n. 23, 48 Antitrust L.J. at 77 ("the antitrust counsel should have the freedom to move throughout the company to audit compliance"). Hale, *supra* n. 24, 1 Corp. Prac. Com. at 19; Forrow, *supra* n. 24, 34 Bus. Law. at 1805; Daniel, Fedders & Schweitzer, *The Internal Investigation*, Parallel Grand Jury and Administrative Agency Investigations, Tab G-1 at p. 19 (ABA National Institute 1978); Anderson, *supra* n. 24, 18 Bus. Law. at 741, 743, 746-747; Ellis, *Preventive Antitrust*, *supra* n. 24.

28. Hence, communications made in connection with such programs would not qualify for protection under the work-product doc-

into ongoing corporate training programs during which employees are encouraged to seek advice concerning specific fact situations. Such programs are clearly threatened by the control group test. While no one would argue that corporations will not continue to seek the advice of counsel in connection with compliance efforts, the scope and quality of counseling and, thereby, the level of compliance by corporations with the many laws governing their activities, will inevitably suffer.

This important relationship between the scope of the privilege and compliance by corporations with laws dependent for their enforcement on the responsibility and advice of corporate counsel was described in *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1165-65 (D.S.C. 1974), as follows:

> [T]he only way that a lawyer can really understand how a corporation operates, what it is doing, and what it can do within the confines of the antitrust laws, is to go out into the branch offices and into the field to make the rounds with the salesmen. After the lawyer forms his or her opinion, it is of no immediate benefit

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trine, discussed in Part V of this Brief, *infra*. Some courts adopting the control group test appear to have been unduly and improperly influenced by the availability of work-product protection in the cases before them. *E.g., In re Grand Jury Investigation (Sun Company, Inc.)*, 599 F.2d 1224 (3d Cir. 1979). In *Sun*, the Third Circuit also stated that adoption of the control group test would not significantly deter a corporation from conducting an internal investigation because "the potential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential." 599 F.2d at 1237. This statement may have been influenced by the fact that, in *Sun*, evidence of wrongdoing was brought to management's attention, raising the possibility of personal liability if an investigation was not undertaken. This factor is not present in many voluntary compliance settings.

> to the chairman of the board or the president. It must be given to the corporate personnel who will apply it. If an attorney cannot make inquiries of salesmen and if the attorney cannot give advice to the corporate personnel who will apply it, then a corporation would be reluctant to seek legal advice since its confidential communications would not be protected by the attorney-client privilege. This court recognizes that it is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients.[29]

The subject matter test encourages corporate compliance programs because it enables corporate managers to direct middle management and lower-level employees to communicate freely with corporate attorneys without fear of having the results of such discussions served up on a silver platter to litigation-minded adversaries. By failing to focus on the need for full disclosure between the attorney and employees throughout the corporation, the court below adopted a test which would destroy one of the key societal benefits of the privilege, that of fostering voluntary compliance efforts by corporate clients.

## V. AN ATTORNEY SHOULD NOT BE REQUIRED TO PRODUCE MATERIAL PREPARED IN ANTICIPATION OF LITIGATION IN RESPONSE TO AN ADMINISTRATIVE SUMMONS WITHOUT A DEMONSTRATION OF NEED.

In a single footnote, the court below brushed aside the right of individual and corporate taxpayers to protect

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[29] *See also,* Report of Committee on the Federal Courts of the New York County Lawyers Association 7-10 (April 1970), quoted in 2 Weinstein & Berger, *Weinstein's Evidence,* ¶503[01], p. 503-12 n. 1 (1979); Pye, *the Attorney-Corporate Client Privilege,* 15 Prac. Law. 15, 19 (1969); Burnham, *Confidentiality and the Corporate Lawyer,* 56 Ill. B. J. 542, 548 (1968); Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation,* 50 So. Cal. L. Rev. 303, 309 (1977).

materials prepared in anticipation of litigation from discovery pursuant to administrative summons. The Sixth Circuit held that the work-product doctrine developed in *Hickman v. Taylor,* 329 U.S. 495, is not applicable to IRS administrative summonses. 600 F.2d at 1228 n. 13. That conclusion is demonstrably wrong and should be reversed.

The administrative summons was issued by an IRS Special Agent to Upjohn's General Counsel, Gerard Thomas, a petitioner herein, under 26 U.S.C. § 7602.[30] It is undisputed that the summons specifically required production of confidential materials prepared in anticipation of litigation involving, *inter alia,* securities and tax issues. The materials requested by the IRS, witness statements and interviews, are precisely those which are central to the attorney-advocate's preparation of his case.[31] Thorough,

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30. Section 7602 provides, in pertinent part:

> "For the purpose of ascertaining the correctness of any return, . . . the Secretary or his delegate is authorized –
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person . . . to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry. . . ."

31. Applying the work-product doctrine to a grand jury investigation, the District Court noted in *In re Terkeltoub,* 256 F. Supp. 683, 685 (S.D.N.Y. 1966):

> At the heart of the job of "thorough-going investigation and preparation" is the interviewing of prospective witnesses, hostile as well as friendly. And no lawyer, on any side of any case, would consider it salutary for his client that the opposition knew who was being interviewed and what was being said during such meetings. If vivid illustration were needed, it is supplied every day in this courthouse by the Government's stout resistance to discovery efforts by defendants in criminal cases.

efficient, and uninhibited trial preparation is the objective the work-product doctrine fosters. The doctrine is essential to "the orderly prosecution and defense of legal claims." 329 U.S. at 510.

A summons issued by a Special Agent of the IRS Criminal Investigation Division can lead to further civil or even criminal proceedings. See *United States v. LaSalle National Bank,* 437 U.S. 298. Indeed, the far-reaching investigative powers of the IRS under 26 U.S.C. § 7602 have been likened in breadth to that of a grand jury. *United States v. Powell,* 379 U.S. 48, 57; *United States v. Amerada Hess Corp.,* 80-1 U.S.T.C. ¶ 9160 (3d Cir. 1980); *United States v. Matras,* 487 F.2d 1271 (8th Cir. 1973). Nevertheless, the § 7602 summons power is "subject to the traditional privileges and limitations." *United States v. Euge,* ..... U.S. ....., 100 S. Ct. 874, 879. See also, *Reisman v. Caplin,* 375 U.S. 440. *Donaldson v. United States,* 400 U.S. 517, 528-529; *United States v. Powell,* 379 U.S. at 58. The witness who has been summoned "may challenge the summons on any appropriate ground" – including, but not limited to, the defense that the material sought "is protected by the attorney-client privilege." *Reisman v. Caplin,* 375 U.S. at 449.

Moreover, in addition to the fact that *Euge, Reisman* and *Donaldson,* strongly suggest that the work-product doctrine is available as a defense to an administrative summons, three courts have squarely so held. *United States v. Amerada Hess Corp.,* 80-1 U.S.T.C. ¶ 9160 (3d Cir. 1980); *United States v. Brown,* 478 F.2d 1038 (7th Cir. 1973); *United States v. Lipshy,* 79-2 U.S.T.C. ¶ 9628 (N.D. Tex. 1979). Only one court, other than the court below, has indicated that it "doubted" that the doctrine applies. *United States v. McKay,* 372 F.2d 174, 176 (5th Cir. 1967). That *dictum,* rather than the clear authority to the contrary, was relied on by the court below. 600 F.2d at 1228 n.13.

The reliance is misplaced. The Fifth Circuit's statement was based on a now demonstrably erroneous assump-

tion: that the work-product doctrine is inapplicable to grand jury proceedings. *McKay,* 372 F.2d at 176. There is now almost universal acceptance by the lower federal courts of the applicability of the work-product doctrine to grand jury investigations.[32] In fact, this clear authority applying the doctrine to grand juries has undermined the Fifth Circuit's *McKay dictum* to such a degree that a District Court within that Circuit recently concluded that *McKay* did not bar it from applying the doctrine to an IRS summons. *United States v. Lipshy, supra,* 79-2 U.S.T.C. ¶ 9628 at pp. 88, 280-281.

In its opinion in *United States v. Amerada Hess Corp.,* issued after this case was decided by the Sixth Circuit, the Third Circuit found that the analogy of IRS investigatory powers to grand jury proceedings (an analogy endorsed by the Government at page 28 of its brief submited to the court below) compels the conclusion that the doctrine may be invoked as a defense to an IRS summons, 80-1 U.S.T.C. ¶ 9160 at p. 83, 177:

> The government's argument for its inapplicability to IRS summons proceedings is predicated upon the inquisitorial, rather than adversarial, nature of those proceedings. Grand jury investigations are equally inquisitorial, and the interest of the federal government in discovering instances of violations of the criminal

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32. *In re Grand Jury Investigation (Sun Company, Inc.),* 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Subpoena Dated December 19, 1978,* 599 F.2d 504 (2d Cir. 1979); *Velsicol Chemical Corp. v. Parsons,* 561 F.2d 671 (7th Cir. 1977), *cert. denied,* 435 U.S. 942; *In re Grand Jury Proceedings (Duffy),* 473 F.2d 840 (8th Cir. 1973); *In re Grand Jury Investigation (Sturgis),* 412 F.Supp. 943 (E.D. Pa. 1976); *In re Grand Jury Subpoena (Rosenbaum),* 401 F.Supp. 807 (S.D.N.Y. 1975); *United States v. Mitchell,* 372 F.Supp. 1239 (S.D.N.Y.), *app. dism'd,* 485 F.2d 1290 (2d Cir. 1973); *In re Terkeltoub,* 256 F.Supp. 683 (S.D.N.Y. 1966). *Duffy* and *Terkeltoub* were cited favorably by this Court in *United States v. Nobles,* 422 U.S. 225, 238 n. 12.

> law is at least as great as its interest in discovering amounts due to it under the Internal Revenue Code. It would be quite anomalous to hold that the work product rule applied to a grand jury inquisition, but not to an IRS section 7602 inquisition.

The effect of the holding below is to penalize and, hence, discourage, the thorough preparation of administrative cases. The handicap it imposes on administrative litigants and their attorneys is unique and unprecedented in other civil and criminal discovery proceedings. Concurring in *Hickman,* Mr. Justice Jackson described the effect of such a ruling, 329 U.S. at 514-515:

> The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the everchanging and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

The handicap imposed on administrative litigants by the court below is clearly unwarranted because the work-product doctrine itself incorporates limitations which are adequate to safeguard an agency's discovery requirements. The doctrine permits discovery of materials prepared in anticipation of litigation upon a showing of need therefor. *Hickman,* 329 U.S. at 511-512; Federal Rule of Civil Produre 26(b)(3). When applied to an administrative summons, the work-product doctrine simply requires the government to demonstrate what any other litigant must

demonstrate: its need for an attorney's trial preparation materials.[33]

The government can make no credible argument, aside from its own administrative convenience, to justify dispensing with the policy of the work-product doctrine and granting it discovery rights superior to that of a grand jury.[34] In *United States v. Nobles,* 422 U.S. 225, 238, this Court saw no reason to limit application of the work-product doctrine to civil proceedings, saying "its role in assuring the proper functioning of the criminal justice system is even more vital." An administrative summons, issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602, must be governed by the same policies if the right to the meaningful assistance of counsel is to be preserved in administrative investigations as well as in judicial proceedings.

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33. Recognizing that the doctrine may be applicable, the government, in the court below, argued that it had demonstrated necessity because, *inter alia,* a number of persons interviewed by Upjohn's counsel were located abroad and the witnesses might be reluctant or hostile to respond to IRS questioning. The Sixth Circuit did not reach this issue but similar claims have recently been rejected by the Second and Third Circuits in grand jury cases where the government had made no reasonable effort to secure the testimony of witnesses. *In re Grand Jury Investigation (Sun Company, Inc.)* 599 F.2d at 1232-1233; *In re Grand Jury Subpoena Dated December 19, 1978,* 599 F.2d at 512-513.

34. *Cf. United States v. Coopers & Lybrand,* 550 F.2d 615, 621 (10th Cir. 1977) ("Mere convenience does not make an item producible under an IRS summons"); *United States v. Matras,* 487 F.2d 1271, 1275 (8th Cir. 1973) ("The term 'relevant' [in § 7602] connotes and encompasses more than 'convenience' ").

## CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed and enforcement of the summons denied in all respects.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-886**

THE UPJOHN COMPANY AND GERARD THOMAS VICE PRESIDENT, SECRETARY AND GENERAL COUNSEL, *Petitioners,*

v.

UNITED STATES OF AMERICA AND DAVID NOWAK, SPECIAL AGENT, INTERNAL REVENUE SERVICE, *Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-886

THE UPJOHN COMPANY AND GERARD THOMAS VICE PRESIDENT, SECRETARY AND GENERAL COUNSEL, *Petitioners,*

v.

UNITED STATES OF AMERICA AND DAVID NOWAK, SPECIAL AGENT, INTERNAL REVENUE SERVICE, *Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

### INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business and professional organizations in the United States. Its current membership exceeds 96,000 members, including over 92,000 corporations, partnerships and sole proprietorships, as well as over 4,000 state and local chambers of commerce and trade associations.

The Chamber regularly represents its members' interests in litigation matters before the Courts, the United States Congress, the Executive Branch and Federal Regulatory Agencies. Such representation constitutes a significant aspect of the Chamber's activities and in-

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule No. 42(2).

cludes participation as an *amicus curiae* in a wide spectrum of cases before this Court.[2]

The question before the Court in the instant case is whether the Court of Appeals for the Sixth Circuit erred in holding that only the senior management of a corporation is closely enough identified with the corporation as a whole to invoke the corporation's attorney-client privilege. This Court has also been asked to decide whether the lower court erroneously held that attorney notes and memoranda that otherwise meet the criteria of the work-product doctrine, which are the subject of an IRS summons, are not protected from disclosure by the work-product doctrine.

The instant case is of vital concern to the Chamber and its numerous corporate members who regularly employ attorneys to provide legal advice to their officers and employees. It cannot be gainsaid that Americans increasingly adopt legal approaches for resolving conflicts that have traditionally been considered non-legal in nature.

Corporations, perhaps more than other entities, require legal advice on a daily basis to comply with the myriad of legal requirements which permeate every aspect of their operations, from the mundane to the very complex.

The concern of the Chamber and its corporate members is that the narrow application that the lower court accorded the attorney-client privilege and the work-product doctrine will reduce them to mere nullities, thereby depriving corporations and their at-

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[2] *See, e.g., Whirlpool Corp.* v. *Ray Marshall,* _____ U.S. _____, 63 L.Ed.2d 154 (1980); *Chrysler Corp.* v. *Brown,* _____ U.S. _____, 60 L.Ed.2d 208 (1979); *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978).

torneys of countervailing desirable objectives that the doctrines were designed to achieve.

## SUMMARY OF ARGUMENT

### I

Open and free communication between attorneys and their clients is, and has always been, recognized as a paramount prerequisite to the success of the legal system. Moreover, it has long been recognized that the only way in which to assure candidness in the relationship is through guaranteeing that such communication remains confidential. This guarantee, the attorney-client privilege, is grounded in practicality to protect all clients, including corporations. Unfortunately, the decision of the Court below, which limits the privilege to a narrowly defined "control group" goes a long way toward depriving corporations of the time-honored right to confidentiality.

### II.

The Sixth Circuit's decision, applying the narrowly described "control group" test, comes at a time when all indicators demonstrate that it will ill serve the legal system and fail to achieve the objectives underlying the attorney-client privilege. The corporate form of doing business has grown in this century by leaps and bounds, and has become the dominant client in today's business environment.

The corporation, has grown from a small, highly centralized entity to a highly divisionalized one with decision making dispersed both horizontally and vertically; and, governmental bodies, at all levels, have imposed increased regulations on all forms of business, vir-

tually guaranteeing the need for greater involvement by lawyers in the corporate decision making process.

## III

The Sixth Circuit's decision is based upon two mistaken premises; first, that corporate employees seek legal advice to shield from discovery their thought processes, and, second, that the search for truth in the adversarial process eclipses other societal interests.

The first premise totally ignores the practicalities of modern management. Corporate boards of directors and officers rarely, if ever, are so personally involved with corporate affairs so as to ensure the give-and-take vital to the attorney-client relationship. Rather, the privilege should appropriately apply to the entire class of corporate decision makers who are given, and who exercise discretionary authority within their respective corporations.

The second premise totally ignores the societal interest in encouraging citizens, including corporations, to comply with ever changing, complex laws. Various government agencies and officials have conceded that the effectiveness of many laws depends upon self-policing. And, a Supreme Court ruling which would deprive middle and lower level corporate employees of the privilege's protective mantle would only ensure their reluctance to confer with corporate counsel on compliance issues, thus substantially undermining the success of the government's regulatory efforts.

## IV

Today's corporate counsel must act as advisor, fact-finder and advocate on behalf of the client's interests.

The Sixth Circuit's "control group" test substantially inhibits the effective discharge of these responsibilities.

Preventive law constitutes a major percentage of the attorney's practice. Unless corporate employees at various levels of operations who make decisions on a daily basis, have timely access to legal advise, the practice of preventive law suffers.

The attorneys's role as factfinder is a natural outgrowth of his responsibility to keep his corporate client free of legal entanglements by assuring its compliance with the law. A lawyer who is ignorant of the facts cannot intelligently advise. As discussed *supra,* many, if not most, regulatory laws depend upon voluntary compliance, an objective clearly within the public interest.

Finally, we submit that a broader rule than that enunciated by the Sixth Circuit would promote full attorney-client communication, an acknowledged desirable objective, without inhibiting the operation of the adversarial process.

## V

The second issue before this Court, is whether the work-product privilege may be invoked in response to an administrative summons issued in an IRS investigation. The Chamber respectfully suggests that the same policy considerations which make the privilege applicable to civil and criminal litigation, and grand jury proceedings, make it equally applicable to the IRS administrative proceeding. First, the process is clearly adversarial; and, criminal or civil litigation may evolve from the investigation. Second, this proceeding is similar

to the grand jury proceeding, in which the courts have held that the privilege is applicable. And, third, constitutional guarantees of due process and effective assistance of counsel require the application of the principle.

## ARGUMENT

### I.

The attorney-client privilege has for centuries been recognized in the English and American legal systems as a vehicle for encouraging full communication between legal advisors and clients. Originally conceived to protect the inherent honor in the business of lawyering, the privilege belonged to the attorney.[3]

Over the years the traditional explanation for the privilege yielded to a utilitarian one[4] and the privilege is today "based on the theory that although certain confidential communications may have evidentiary relevance, 'their revelation will impair the social good derived from the proper performance of the functions of lawyers for their clients' " (footnote omitted).[5]

The attorney-client privilege protects not only communications flowing from the client to the attorney, but also communications flowing from the attorney to the client, if revelation of the attorney communication would necessarily reveal the client communication. *Natta* v. *Hogan,* 392 F.2d 686, 692-3 (10th Cir. 1968). It exists

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[3] Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement,* 91 Harv.L.Rev. 464 (1977); comment, *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation,* 39 Fordham L.Rev. 280 (1970).

[4] 91 Harv.L.Rev. at 465.

[5] 39 Fordham L.Rev. at 281.

regardless of whether litigation is anticipated. *Id.* at 692. And, there is no question that a corporation enjoys the protection of the attorney-client privilege. *Bell* v. *Maryland,* 378 U.S. 226, 263 (1964); *Radiant Burners, Inc.* v. *American Gas Association,* 320 F.2d 314 (7th Cir. 1963), *cert. denied,* 375 U.S. 929 (1963).

According to the ABA Code of Professional Responsibility, "a lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative or other person connected with the entity." Ethical Consideration 5-18. The Code, however, offers no assistance in determining who may speak for the corporation to its counsel, and therefore, invoke the privilege.

The Sixth Circuit, along with other courts, has held that only a small group consisting of corporate officers and directors (the "control group") are sufficiently identified with the corporation to invoke the attorney-client privilege. *United States* v. *Upjohn,* 600 F.2d 1223 (1979).[6]

It is the Chamber's contention that, for the reasons set forth in this brief, the holding of the court below totally ignores the practical realities of the flow of information and the decision making process in modern day corporations, places great importance on the discovery process at the expense of all other societal interests, and that this myopic viewpoint renders the privilege virtually meaningless in the corporate context.

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[6] *See e.g., In Re Grand Jury Investigation,* 599 F.2d 1224 (3rd Cir. 1979); *contra, Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir. 1977) (*en banc*).

## II.

Two intertwined developments in the law and in the structure of American corporations best illustrate why the "control group" test is inadequate to achieve the objectives underlying the attorney-client privilege. They are the growth of the corporation and the increased government regulation of corporate affairs.

The lawyer in pre-twentieth century America worked in the "golden age of advocacy."[7] In that era, the vast majority of clients were individuals who sought legal advice only after difficulties had progressed to the litigation stage.[8] In this "pre-industrial age," problems related to the application of the privilege, such as those presented by this case, were non-existent.

The Industrial Revolution, however, induced significant changes in the practice of law. The corporation replaced the sole proprietorship as the dominant business entity.

> The impact of the corporation on the legal profession was immense. Increasingly the function of the lawyer was to construct corporate institutions and empower them to perform the important tasks for which they had been created. In the process he had to foresee the problems that corporations would face. No longer could the lawyer be content to rely on ancient postulates and precedents; he was required to use his imagination to make thoughtful preparations for the future to do a constructive job. His attention was more and more given to preventing litigation, anticipating troubles, avoiding dif-

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[7] Gossett, *The Corporation Lawyer's Social Responsibilities*, 60 A.B.A. Jour. 1517 (Dec. 1974).

[8] *Ibid.*

> ficulties. Instead of looking backward, his responsibility was to look ahead.

Gossett, *The Corporation Lawyer's Social Responsibilities,* 60 A.B.A. Jour. 1517 (Dec. 1974).

Significantly, early corporate management was highly centralized. However, by the end of World War II, the tremendous growth and the increasing complexity in corporations, caused by diversification, led to "divisionalization."[9] Under this management model "[e]ach division of the corporation is a self-sustaining, autonomous unit with a manager who, like the head of a company, is accountable for its performance."[10]

As a corollary to divisionalization, the number of corporate managers increased geometrically and a cadre of officials was created with final responsibilities for various segments of the corporation's operations. In the modern corporation, then, there is no single decision maker who has both the authority and responsibility to make all decisions for the corporation. Rather, decision makers exist along a vertical axis, and their authority depends upon the importance of the issue to overall corporate affairs.

Concomitant with this growth of the modern corporation, and the increase in the number of decision makers within the corporation, has been the growth in the number of regulatory programs developed by both federal and state governments that impact upon corporations.[11] The number and complexity of these regula-

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[9] H. Stieglitz and A. Janger, *Top Management Organization in Divisionalized Companies,* [Conference Board, Studies in Personnel Policy No. 195 (1965)].

[10] *Id.*, Chapt. 1.

[11] Rast, *What the Chief Executive Looks for in his Corporate Law Department,* 33 Bus. Law. 811, 812 (1978); FORTUNE, April 1973 at 65, 69.

tions, of necessity, have resulted in a substantial increase in the number of corporate attorneys upon whom management must rely.[12]

## III.

As a result of these historical developments in the management of the modern business enterprise, as well as the growth of governmental regulation, counsel to the modern corporation has three fundamental responsibilities which are an integral part of the rendering of legal services to the client organization: legal advisor, factfinder, and legal advocate. What we will now demonstrate is that the "control group" test, as enunciated by the Sixth Circuit, subverts, rather than subserves, the discharge of these responsibilities in a manner consistent with those societal goals which underpin the privilege itself.

As previously noted, the privilege is intended to facilitate attorney-client communications in the belief that such candid and frank discussion is necessary "in the interest and administration of justice," *Hunt* v. *Blackburn,* 128 U.S. 464, 470 (1888), quoted in *United States* v. *United Shoe Machinery Corp.,* 89 F.Supp. 357, 358 (D.Mass. 1950), and thereby fulfills a socially significant function.[13] The "control group" test, however, does not further this elemental interest.

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[12] In a survey conducted by Fortune, of a cross section of top U.S. corporations, the data indicated that the annual bill for legal departments and outside counsel was $1.3 billion for the top 1300 corporations. Corporations also reported increases in legal outlays of about 75% in six years as well as increases in the number of in house attorneys of approximately one-third. In that same survey it was estimated that legal expenses for all U.S. corporations had reached approximately $3 billion. This survey was conducted in the early 1970's. Thus, due to inflation, as well as recently enacted laws and regulations, the figures today would be considerably higher. FORTUNE, *supra,* note 11.

[13] See discussion *supra* at 6-7.

The essence of the Sixth Circuit's opinion is that the search for and the discovery of the truth would be severely hamstrung, if not totally undermined, by the application of any principle other than the test endorsed in the opinion. In reaching this conclusion, however, the panel proceeds from two premises which, we believe, are not borne out by an analysis of the relationship between corporate counsel and their respective institutional clients.

First, the court assumes that a corporation's employees, whether or not they are within the "control group," as rigidly defined by the Sixth Circuit,[14] confide in legal counsel for the express purpose, *inter alia,* of seeking a protective mantle from discovery of their thought processes. And, because the motivation for seeking the advice of counsel is mixed, proponents of this view suggest that the entire claim to the privilege is thereby tainted.

Leaving aside the obvious consideration that the privilege never attaches unless the now-classic four-prong test enunciated by Judge Wyzanski in *United Shoe,* 89 F.Supp. at 358, 359 is met,[15] such an implicit

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[14] See discussion *infra* at 18.

[15] Judge Wyzanski's widely cited formulation of the test is as follows:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

belief neither speaks well for the image of contemporary business before some courts, nor for the understanding of the realities of modern business practices by those courts.

We respectfully suggest that this Court appropriately should look to what one district judge has termed the "most well-reasoned analysis of this issue in light of the purposes of the attorney-client privilege when the client is a corporation."[16]

In *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F.Supp. 1146 (D.S.C. 1974), the court began its analysis by "taking a common-sense look at the practicalities of the 'control group' test and its applicability in the day-to-day workings of a lawyer." *Id.* at 1164. In proceeding in this way, the court necessarily took cognizance of the decentralized management system of the modern corporation[17] when it observed:

> [I]f a corporation needs legal advice, it cannot deal solely through the chairman of the board of directors. There has to be a sufficient number of persons within a corporation who are authorized on behalf of the corporation to seek advice, to give information with respect to the rendition of advice, and to receive advice.

*Ibid.*[18]

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[16] *In Re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 386 (D.D.C. 1978, Richey, J.).

[17] See discussion *supra* at 9.

[18] The court ultimately concluded that the control group test, standing alone, was inadequate for determining the proper scope of the privilege, and applied the subject matter test of *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487, 491-492 (7th Cir. 1970), *affirmed per curiam by an equally divided court*, 400 U.S. 348 (1971), "as a necessary corollary to the 'control group' test." *Duplan, supra* at 1165.

As shall be discussed more fully below, the need of lower and middle management for access to legal counsel is often as acute as the need of senior management. And, advice is not sought for the purpose of evading the law, but to develop legal solutions to business problems. Indeed, more than one corporate executive has argued that what he or she desires from legal counsel is information on what can be done, not on what is prohibited.[19]

Beyond this pragmatic need for counsel, however, it should be noted that the "control group" test itself does not, contrary to the Sixth Circuit's suggestion, motivate the senior management to seek information from lower and middle managers which the "control group" members might not normally have available to them, any more than a "subject matter test encourages senior managers to ignore important information they have good business reasons to know and use." 600 F.2d at 1227.

In the first instance, many corporate decisions with significant legal implications are made by individuals who are not part of a narrowly defined "control group." And "senior managers," as a practical matter, may not be "informed" of matters concerning which the privilege may subsequently be claimed. (However, for the reasons discussed *infra,* the privilege still should be applicable.)

Second, to the extent that the information in question should be brought to the attention of the highest levels of management of the corporation, as a matter of policy, even under the most rigid "control group" test,

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[19] *A Businessman's View of Lawyers,* 33 Bus. Law. 817, 819, 827 and 831 (1978).

the privilege will be applicable, and the information will not be disclosed.

In sum, then, business realities should assuage and mute the concern of the proponents of the "control group" test that any other test will defeat the legitimate purposes of the privilege.

There is, nonetheless, a second presumption which underlies the analysis of the court below; namely, that the "search for truth" through the adversarial process has the greatest social value, and therefore takes precedence over other competing societal interests in defining the outer limits of the attorney-client privilege. This bias is both understandable and natural, for, in our Federal system, Article III mandates that courts hear only live cases and controversies,[20] dismiss mere requests for advisory opinions,[21] and, by virtue of the application of prudential concerns, eschew consideration of matters which might otherwise be postponed or resolved by some alternative method.[22] As a result, courts only view attorney-client questions and policies in the context in which they naturally arise—an adversarial proceeding in which one party seeks information which the opposing party refuses to provide.

We respectfully suggest, however, that the underlying issue here is larger in its dimensions than whether certain matters will be disclosed or barred from

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[20] *Baker* v. *Carr*, 369 U.S. 186, 205 (1962) (Federal courts cannot entertain suits "except as . . . called upon to adjudge the legal rights of litigants in actual controversies").

[21] *Alabama State Fed. of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945) (Because of Article III limitations, "[T]his Court is without power to give advisory opinions.").

[22] *Cf. Schlesinger* v. *Reservists To Stop the War*, 418 U.S. 208, 215 (1974).

disclosure by application of the privilege in an adversarial setting. Rather, the issue which pervades this discussion is whether and how corporations, acting as they must through their employees, officers and directors, will fulfill their societal responsibilities.

As discussed *infra* at 22-23, government regulations are largely dependent upon self-policing by citizens, including corporate citizens, to ensure their proper execution. Similarly, the ever-increasing complexity of these laws cannot be denied. As a result, corporations necessarily have turned to their legal counsel for advice on how they can abide by the law.

Having noted these facts, however, it is too facile an observation to conclude that these "good citizenship" concerns will ensure that corporations will continue to seek the advice of counsel, regardless of the rule of privilege which might be applied. Concededly, in an elementary sense this is true. The fines and penalties which may be visited upon the corporate entity and its principals undeniably both have a deterrent effect and serve to encourage communication with counsel.[23] However, if the privilege is to have any meaning, the quality and quantity of the communication, and its relationship to the nature and character of legal counsel's advice, must be fully considered.

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[23] For example, the EPA in 1973 fined Ford Motor Co. $7 million after the company discovered and reported that some of its employees had unlawfully modified engines on its testing models. FORTUNE, April 1973 at 157.

See also IRON AGE, March 19, 1979 at 25 (Forrest L. Rettgers, Executive Vice President of NAM, noting "that the penalties associated with the infringement of laws by officials are growing more severe, *i.e.*, severe fines and jail sentences for criminal antitrust violations.").

Viewed from this perspective, a narrow construction of the "control group" of a corporation does not further the interests of the privilege. As Judge Hemphill noted:

> . . . [T]he only way that a lawyer can really understand how a corporation operates, what it is doing, and what it can do within the confines of the antitrust laws, is to go out into the branch offices and into the field to make the rounds with the salesmen. After the lawyer forms his or her opinion, it is of no immediate benefit to the chairman of the board or the president. It must be given to the corporate personnel who will apply it. If an attorney cannot make enquiries of salesmen and if the attorney cannot give advice to the corporate personnel who will apply it, then a corporation would be reluctant to seek legal advice since its confidential communications would not be protected by the attorney-client privilege. This court recognizes that *it is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients.* Unless corporate personnel at a fairly low level can speak to attorneys in confidence, the enforcement of the antitrust laws is likely to be adversely affected.

*Duplan, supra,* at 1164 (emphasis supplied).

It is equally important to note that, unless the narrow standard of the Sixth Circuit is overturned, employees outside the control group may themselves become chary about seeking the advice of corporate counsel. That such reluctance to consult with a company's attorneys has not become manifest to date is due to several factors.

First, many employees themselves believe that the corporation's attorneys are their attorneys as well, at

least insofar as matters related to their employment are concerned.[24] As a result, lower and middle management employees regularly do meet with and seek the legal advice of the corporation's attorneys. To be sure, the practice of companies of assigning attorneys to branch or regional offices serves to confirm this belief.[25]

Second, there is no unanimity of thinking between and among the various federal courts as to who constitutes the "control group," and even some formulations of who is in the "control group" might be read to support the employee's view of existence of an attorney-client relationship. For example, Judge Kirkpatrick, in his original and very practical formulation of the control group test in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D.Pa. 1962), *mandamus denied sub nom., General Electric Co.* v. *Kirkpatrick,*

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[24] This observation is borne out by a recent study undertaken to explore the role and function of house counsel in American corporations. When asked who within the corporation had access to the legal staff, about 50 percent of the executives surveyed responded that "corporate executives" or "management personnel" had direct access, and 50 percent responded that "anyone employed by the corporation" had access. *A Comment on the Role, Structure, and Function of a Corporate Legal Department,* 14 Amer. Bus. Law Jour. 227, 228 (1976).

It is further documented by Boeing Company's vice president and general counsel who has reported that prior to 1976 Boeing had no corporate legal department. Rather, "all legal work had been done at the division level and by outside counsel." AVIATION WEEK & SPACE TECHNOLOGY, September 4, 1978 at 208.9.

[25] An example is United Technologies Corp. which according to its vice president and general counsel "is structured in the autonomous division concept, with legal staffs in each division." AVIATION WEEK & SPACE TECHNOLOGY, September 4, 1978 at 207.

312 F.2d 742 (3rd Cir. 1962), *cert. denied,* 372 U.S. 943 (1963), adopted a functional test when he stated:

> . . . [If] the employee making the communication *of whatever rank he may be,* is in control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.

210 F.Supp. at 485 (emphasis supplied). And, Judge Kirkpatrick went on to conclude that "it would be best to eliminate the idea that [a] line drawn on the organization chart [of the corporation] is to be considered for any purpose whatever." *Id.* at 486.

Clearly, however, courts have not been as flexible in the application of the "control group" test as its author had intimated. In the instant case, the Sixth Circuit stated that the "control group" included "a number of senior corporate officers, including the Chairman of the Board, the Vice Chairman, and the President . . . and possibly others." 600 F.2d at 1227. This tendency to identify the "control group" with senior management is consistent with the holdings in *In Re Grand Jury Investigation,* 599 F.2d 1224, 1237 (3rd Cir. 1979); *Congoleum Industries, Inc.* v. *GAF Corp.,* 49 F.R.D. 82 (E.D.Pa. 1969), *aff'd without opinion,* 478 F.2d 1398 (3rd Cir. 1973); *Garrison* v. *General Motors Corp.,* 213 F.Supp. 515, 518 (S.D.Cal. 1963); *Hogan* v. *Zletz,* 43 F.R.D. 308 (N.D.Okla. 1967), *modified on other grounds sub nom., Natta* v. *Hogan,* 392 F.2d 686 (10th Cir. 1968). At least one district court, however, has recently interpreted the "control group" more broadly as individuals who were not part

of senior management. *Hercules, Inc.* v. *Exxon Corp.*, 434 F.Supp. 136 (D.Del. 1977).

We respectfully suggest that this ambiguity inherent in most of the modern formulations of the "control group" test itself belies the optimism of those courts and commentators who see that test as drawing a "bright line" which provides certainty to employees and counsel alike.[26]

It would be inappropriate, however, to create such a bright line by delineating a "control group" with the narrow specificity suggested by the court below. For, it is not the ambiguity upon which this Court should focus, but the social utility of a more realistic evaluation and intepretation of the privilege.

## IV.

We would respectfully suggest that the social utility of the privilege may be profitably explored in light of the three functions of corporate counsel identified on page 10 *supra*.

First, in the role of legal advisor, corporate counsel's principal concern is whether the institutional client is in compliance with the myriad of laws and regulations—federal, state and local—which impact upon the operations of the company.

There is widespread agreement on the view that this practice of "preventive law" long ago replaced the litigation function[27] as the chief service which lawyers perform for their corporate clients.

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[26] *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3rd Cir. 1979).

[27] By our repeated references to the preeminence of preventive law we do not mean to intimate that litigation is no longer a major

> The practice of preventive law should be the major focus of the corporate practitioner. If the practice of law is a prediction of what judges will do in practice, "preventive law," (i.e., a forward look in anticipation of and hopeful avoidance of future problems) is the essence of corporate law practice today.

B. Forrow, *The Corporate Law Department Lawyer: Counsel to the Entity,* 34 Bus. Law 1797, 1804 (1979).[28]

Corporate executives also emphasize that they increasingly rely on their attorneys on a day-to-day basis for quick advice as they work their way through the regulatory maze that permeates corporate affairs:

> The single most important element in an effective preventive law program is sound day-to-day advice beginning with early involvement of lawyers in proposed transactions that may have significant legal consequences. This requires the lawyer's familiarity with the business and regular interchange between a corporate executive and his lawyer. Regular attendance at staff meetings, sales meetings, and talks on important subjects are essential. Inside counsel can also make significant contributions by working closely with various operating committees on groups, such as safety and environmental committees, alerting these specialists to

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concern of corporations. Just the opposite is true. Lawsuits filed in the federal courts from 1967-1972 in the area of fair employment, environmental, antitrust, labor, securities and patents, copyrights and trademarks almost doubled from the prior six year period, and corporations were involved in a great majority of those cases. FORTUNE, p. 65 (April 1973).

[28] See also, J. DeButts, *Client's View of Lawyer's Proper Role,* 33 Bus. Law. 1177, 1804 (1979).

legal trends or new legislation affecting their areas of responsibility.

34 Bus. Law. 1797 at 1805.[29]

The decentralization of the corporation, coupled with the staggering increases in government regulation, has encouraged—and even demanded—large increases in the numbers of in-house counsel employed by corporations and decreased the amount of legal work assigned to outside law firms.[30] For, as legal considerations become part of more and more corporate decisions, managers at all levels feel the need to have their attorney advisors close by for quick advice.[31]

It should be emphasized that the necessity for ready access to legal counsel is not limited to the officers and directors who make up the "control group" of the corporation. Indeed, as corporate structures become decentralized, many of the "recommendations" of lower and middle management are, *de facto,* the "decisions" of the corporation which, in some generalized sense, emanate from the "control group." As a practical matter, very often these "control group" decisions may be nothing more than the *pro forma* adoption of the reasoning and recommendations of lower echelon managers.[32]

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[29] We do not mean to suggest, of course, that the mere presence of legal counsel at such meetings make the discussions privileged. However, as explained more fully below, this involvement of corporate counsel in the affairs of the client gives rise to a more pervasive involvement with all levels of decision makers, making the privilege itself meaningful in a broader context.

[30] BUSINESS WEEK, July 16, 1979 at 40.

[31] As an example of the importance of the law to all corporate departments, one company estimates that their engineers spend as much as 30 percent of their time on legal matters. IRON AGE, March 19, 1979 at 24.

[32] M. Garber, *Privileged Communications—Who Can Speak for a Corporate Client,* 44 Mo.L.Rev. 350, 356 (1979).

Thus, if legal counsel is to serve both the institutional clients' interest and the larger societal interest in practicing preventive law, there must be unfettered communication between counsel and all levels of management who need to have, rely upon, and act upon the advice of counsel. *Duplan Corp., supra* at 12.

Perhaps nowhere is this need for communication more readily apparent than when one considers the corporate counsel's second role identified above; namely, as factfinder for the corporation. It is this still emerging form of the practice of preventive law, of course, that has given rise to this case.

The petitioners, believing that the corporation or one of its foreign subsidiaries may have made some questionable payments, voluntarily retained a law firm, at the corporation's expense, to ascertain whether any illegal payments had been made to foreign officials. When the law firm's report revealed irregularities, petitioners voluntarily reported them to the SEC and the IRS. The IRS issued an investigative summons and petitioned the court to enforce it when petitioners raised the attorney-client privilege and work-product defense.

Such voluntary compliance should be applauded and encouraged, especially in light of the fact that the Government lacks the personnel and other resources to successfully monitor compliance with every set of guidelines or standards promulgated with respect to every remedial statute. Former Secretary of Labor, John Dunlop, aptly stated the problem in his memorandum to the President of November 12, 1975.

> Legislation, litigation and regulations are useful means for some social and economic problems, but *today government has more regulation on its plate than it can handle.*

* * *

> *Compliance cannot be compelled through a police effort in every workplace* . . . greater emphasis should be placed on helping regulatees achieve compliance, especially through consultation. Trying to force compliance primarily through threats of inspections and stiff fines has not proved successful. It has worked against acceptance of the programs by isolating the regulators (and their expertise) from the regulatees and creating antagonism and distrust between the two. (Emphasis supplied.)

Moreover, it has long been recognized that our Internal Revenue system, which boasts one of the highest compliance rates in the world, relies heavily on voluntary taxpayer compliance.[33]

The Government cannot in good faith suggest that voluntary compliance with its programs is not a desirable and necessary end. Indeed, the SEC indirectly acknowledged that voluntary disclosure of questionable payments is to be encouraged by its policy of more lenient treatment of corporations which voluntarily disclose. *United States* v. *Upjohn,* 78-1 TC 83,597 (W.D. Mich. 1978). And, several courts have recently held that such disclosure to the SEC acts as only a limited waiver of the privilege itself. *Byrnes* v. *IDS Realty Trust,* 48 L.W. 2621 (S.D.N.Y. 1980); *In Re Grand Jury Subpoena Dated July 13, 1979,* 478 F.Supp. 368 (E.D. Wis. 1979).

It should be obvious that such efforts at voluntary compliance cannot be successful without internal communication which extend beyond the "control group." Almost by definition, "control group" members,

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[33] Annual Report of the Commissioner of Internal Revenue, p. 3, (1979).

especially in a decentralized corporation, cannot know all of the minute, detailed facts necessary to compliance and appropriate disclosure. And, it should be equally apparent that employees outside the "control group" may be ill-advised to disclose to corporate counsel, details of potential illegal activity in which they might be implicated unless the privilege applies.[34]

Thus, unless this Court acknowledges the existence of the attorney-client relationship in this setting and, *a fortiori,* the existence of the privilege, this second societal interest may be frustrated.

Finally, we come to the traditional role of legal counsel, that of legal advocate. As noted previously, it is in this context that courts confront attorney-client privilege claims directly. What we respectfully request this Court to keep in mind here, however, is that the "control group" test, by definition, provides only a "bare minimum of protection . . . [which] . . . no one has yet criticized as overly generous." *In re Grand Jury Investigation, supra,* 559 F.2d at 1235. The question properly before this Court, then, is "[w]hether the privilege should be enlarged . . . [to] serve the policy of full communication underlying the privilege itself." *Ibid.* (footnote omitted).

We submit that the factors discussed in this brief do militate in favor of a broader rule than enunciated by the Sixth Circuit Panel. Employees of a corporation do not communicate with corporate counsel for the purpose

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[34] There is also the ethical problem which corporate counsel faces as to whether there is a responsibility to advise individuals outside the "control group" that no attorney-client privilege attaches to their communication and that the employee may be unwittingly waiving his or her privilege against self-incrimination.

of creating a privilege in anticipation of litigation.[35] Rather, as we have demonstrated above, the exigencies of corporate managerial responsibility require unfettered access to counsel by a broad range of employees who "need to know" the advice and opinion of counsel. And, in order for counsel to be effective, the corporate attorney must be familiar with—and is oftentimes expected to be involved in—deliberations which lead to the development of policy at all levels of the corporate hierarchy. Viewed in this context, the corporation calls upon counsel's advocacy skills only when the attorney's skills as a legal advisor and factfinder have been exhausted. It is only at that point that the attorney's earlier labors are demanded by an adversary. We respectfully suggest that, notwithstanding the importance of the pursuit of truth to the adversarial process, the impetus to permit disclosure must be tempered by the other social values which are served by the application of a broader privilege than that permitted by the Sixth Circuit.

## V.

We come, then, to the final issue raised in this litigation: whether the work product doctrine[36] may be invoked when the information at issue is demanded in an Internal Revenue Service ("IRS") administrative

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[35] It is important to note that the privilege does not apply to situations in which advice of counsel is sought in furtherance of an intended or present crime. *United States* v. *Hodge,* 548 F.2d 1347 (9th Cir. 1977). Furthermore, even protected communications lose the protection of the privilege if they are in aid of or in furtherence of a crime or fraud. *United States* v. *Mardian,* 546 F.2d 973 (D.C. Cir. 1976); *Garner* v. *Wolfinbarger* 430 F.2d 1093 (5th Cir. 1970), *cert. denied sub non Garner* v. *First American Life Insurance Co.,* 401 U.S. 974 (1971).

[36] *Hickman* v. *Taylor,* 329 U.S. 495 (1947); *See also,* Fed.R.Civ.P. 26(b)(3).

summons.[37] Curiously, the court below did not undertake any critical review of this doctrine, choosing instead to state in a footnote that the privilege is not applicable to an administrative summons issued pursuant to Internal Revenue Code (I.R.C.) § 7602.[38] We would respectfully suggest, however, that the same policy considerations which underlie the application of this privilege in civil and criminal litigation and the grand jury context apply with equal vigor to this administrative process.

It has long been recognized that the entire process, by which the IRS seeks the production of documentary evidence and enforces its authority to obtain such material in a federal district court, is an adversary proceeding. Once the IRS issues the summons, the party to whom it is directed may produce the summoned information or resist it by raising his defenses before the IRS hearing officer; and, if rebuffed there, by renewing his defenses in the federal district court. *Reisman* v. *Caplan*, 375 U.S. 440, 445-446 (1964). We submit that the uniquely adversarial character of this particular administrative proceeding makes it analogous to other civil and criminal adversarial proceedings and compels the application of the doctrine here.

Furthermore, the initiation of an IRS investigation is, essentially, but a preliminary step to a tax prosecution or determination of tax liability. The purpose of such an investigation is to gather sufficient information to determine whether the taxpayer has reported his cor-

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[37] Int. Rev. Code of 1954, §§ 7601-7611 provide, *inter alia*, for the examination of books and witnesses and the service and enforcement of the administrative summons.

[38] *United States* v. *Upjohn Co.*, 600 F.2d 1223, at 1228 n.13 (6th Cir. 1979).

rect tax liability, or whether there may be civil or criminal violations of the tax laws. Whether the taxpayer will be exposed to criminal or civil liability is dependent upon the information developed by the IRS in its investigation.

This Court has consistently recognized this dual purpose of the IRS upon issuance of a 7602 summons. *United States* v. *LaSalle National Bank,* 437 U.S. 298, 308 (1978); *Couch* v. *United States,* 409 U.S. 322, 326 (1973); *Donaldson* v. *United States,* 400 U.S. 517, 535 (1971). Indeed, "[t]he legislative history of the Code supports the conclusion that Congress intended to design a system with interrelated criminal and civil elements." *LaSalle National Bank, supra,* at 310.

It is this ultimate liability to which the taxpayer is exposed upon issuance of the summons which sharpens the adversarial nature of the investigatory process. Accordingly, preparation of a case for a hearing before an IRS agent pursuant to a 7602 summons presents the taxpayer and his attorney with many of the same problems with which they would be confronted in preparation for a court trial.

Properly viewed, then, the proceedings before the IRS hearing officer are adversarial in nature, and the substantive rights of a party under investigation are in equal jeopardy[19] in the context of this case, as in any other litigation which might cause the loss of liberty or property.

In view of the fundamentally adversary nature of these proceedings, it is not surprising that this Court,

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[19] Miller, *Administrative Agency Intelligence Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service,* 6 B.C.Ind. & Com.L.Rev. 657, 707 (1965).

*sub silentio,* approved the invocation of the work product defense in *Reisman, supra.* In that case, the taxpayer's attorney advanced a work product defense in response to an IRS summons directed to his client's accounting firm. 375 U.S. at 442. Although this Court found that the petitioner would have an adequate remedy in the enforcement proceeding (and, thus, did not address the question whether the documents in question constituted attorney work product), the Court emphasized the rights of "parties summoned and those affected by a disclosure [to] appear . . . before the District Court and challenge the summons by asserting their constitutional or other claims." 375 U.S. at 445 (citations omitted).[40] The Court went on to say, "[we] agree with that view and see no reason why the same rule would not apply before the hearing officer."[41] *Ibid.*

It is especially significant that the right to assert the work product privilege has been expressly affirmed in the context of grand jury proceedings,[42] to which the

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[40] Twenty-seven years prior to the decision in *Reisman,* Judge Learned Hand presaged the Court's conclusion when in dictum in an SEC summons enforcement proceeding he said, "we assume . . . that the conduct of investigations under this statute is subject to the same testimonial privileges as judicial proceedings . . ." *McMann* v. *SEC,* 87 F.2d 377, 378, (2d Cir. 1937) *cert. denied,* 301 U.S. 684 (1937). That dictum was adapted to an IRS enforcement proceeding in *Falsone* v. *United States,* 205 F.2d 734, 738, n.8 (5th Cir. 1953).

[41] *See also, Donaldson* v. *United States,* 400 U.S. 517 (1971), where the Court, in dictum, noted, that the "material sought . . . consists only of . . . routine business records . . . which are not the work product of [the taxpayer's] a attorney . . ." *Id.* at 530. There, again, the Court, *sub silentio,* recognized the applicability of the work product doctrine.

[42] *In Re Grand Jury Investigation, 599 F.2d 1224, 1228 (3rd Cir. 1979). In Re Grand Jury Supoena,* 599 F.2d 504, 509 (2d Cir. 1979). *Velsicol Chemical Corp.* v. *Parsons,* 561 F.2d 671, 676 (7th Cir. 1977). *In Re Grand Jury Proceedings (Duffy),* 473 F.2d 840,

IRS administrative summons and hearing has often been analogized.[43] The IRS, like the grand jury, "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Powell,* 379 U.S. 48, 57 (1964), citing *United States* v. *Morton Salt Co.,* 338 U.S. 632, 642-643 (1950). In addition, the IRS possesses an inquisitorial power to execute its investigative responsibilities. *Powell, supra* at 57. The IRS is not a disinterested inquisitor like a grand jury. Because the IRS is charged with the responsibility both to investigate tax liability and to enforce tax collection, there is a juxtaposition of the investigatory and prosecutorial functions.[44]

Unlike the grand jury, however, the investigative functions of the IRS are not supported "by the same historical and constitutional foundations that support a grand jury's investigative functions; and, thus possess none of the traditional safeguards against investigative abuse found to be operating in the grand jury context."[45] The grand jury stands between the accuser

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842 (8th Cir. 1973). *In Re Grand Jury Investigation (Sturgis),* 412 F.Supp. 943, 946-947 (E.D.Pa. 1976). *Matter of Rosenbaum,* 401 F.Supp. 807, 808 (S.D.N.Y. 1975). *United States* v. *Mitchell,* 372 F.Supp. 1239, 1245 (S.D.N.Y. 1973). *In Re Terkeltoub,* 256 F.Supp. 683, 685 (S.D.N.Y. 1966).

[43] *United States* v. *Powell,* 379 U.S. 48, 57 (1964); *United States* v. *Coopers and Lybrand,* 550 F.2d 615, 619 (10th Cir. 1977); *United States* v. *Cortese,* 540 F.2d 640, 642 (3rd Cir. 1976); *United States* v. *Matras,* 487 F.2d 1271, 1274 (8th Cir. 1973); *United States* v. *Widelski,* 452 F.2d 1, 4 (6th Cir. 1971); *United States* v. *McKay,* 372 F.2d 174, 176 (5th Cir. 1967); *Falsone* v. *United States,* 205 F.2d 734, 742 (5th Cir. 1953); *United States* v. *Amerada Hess Corp.,* 80-1, USTC 83,172, 83,177 (3rd Cir. 1980).

[44] Comment, *Constraints on the Administrative Summons Power of the Internal Revenue Service,* 63 Iowa L.Rev. 526, 534 (1977).

[45] *Ibid.*

and the accused. The IRS hearing officer does not; he is the accuser.

Finally, we note that the protections for which we are pressing are rooted in Constitutional considerations. First, there is the Fifth Amendment guarantee of due process. Admittedly, "[d]ue process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." . . . [W]hether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, . . . are all considerations which must be taken into account." *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960).

But, if due process means anything, it must include the right of the taxpayer to assert a meaningful defense against the government's expropriation of his liberty or property. Moreover, it cannot be denied that in most legal proceedings, and most assuredly, complex tax proceedings, a taxpayer, even a corporate taxpayer, cannot present a meaningful defense without the assistance of able counsel. It goes without saying, then, that due process would be reduced to no more than an illusion if parties summoned before the counts and the IRS are prevented from articulating defenses that militate in their favor.

Second, there is the Sixth Amendment guarantee of assistance of counsel in criminal prosecutions. It is axiomatic that assistance of counsel means "effective counsel." As discussed *supra*, at 26-27, criminal prosecutions may evolve from the investigations. To force an attorney to deliver over to the prosecutor, documents prepared to defend in litigation is to subvert entirely, the notion of effective counsel.

## CONCLUSION

For the foregoing reasons, we respectfully urge that this Court reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

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No. 79-886

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THE UPJOHN COMPANY, ET AL.,
Petitioners,
v.
UNITED STATES OF AMERICA, ET AL.,
Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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# BRIEF OF THE FEDERAL BAR ASSOCIATION AS AMICUS CURIAE

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FOR THE SIXTH CIRCUIT

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# BRIEF OF THE FEDERAL BAR ASSOCIATION AS AMICUS CURIAE

The Federal Bar Association, with the consent of the parties, submits this Brief as amicus curiae in support of Petitioners.

## QUESTION PRESENTED

Whether communications between employees of a corporation and an attorney representing that corporation are entitled to the full protections of the attorney-client privilege only when the employees are those responsible for deciding and directing the corporation's response to the attorney's legal advice.

## INTEREST OF THE FEDERAL BAR ASSOCIATION

The Federal Bar Association is a professional association of approximately 14,000 lawyers and judges, the majority of whom are now or have been in service to the Federal Government. The Association is dedicated to advancing the science of jurisprudence and promoting the administration of justice and the highest quality representation before the Courts, departments, and agencies of the United States.

The parties to this case necessarily must focus upon the facts and the law in the context of their own interests and the particular circumstances of this case. But the question of the extent to which the attorney-client privilege protects communications between attorneys and their corporate clients implicates interests transcending the specific and narrow interests of Petitioners and Respondents in this litigation. The bedrock of the privilege is the nature of legal representation itself, and the constriction upon the privilege adopted below may influence the practice of law in a way contrary to the public's interest in the sound administration of justice and transaction of business by public institutions. The restrictive test for determining the extent of the attor-

ney-client privilege, embraced by the Court below, may impede effective and responsible legal representation of Federal agencies as well as corporations.

This Brief will focus upon these broad adverse consequences of the restrictive test for application of the attorney-client privilege that was adopted below.[1/]

## SUMMARY OF ARGUMENT

The narrow scope of the attorney-client privilege adopted by the Court below is a disservice to the public's interest in ensuring that public and private organizations receive responsible legal counsel for the conduct of their business.

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1/ We will not address the question presented to this Court with respect to whether the work product doctrine was properly applied in this case.

Limiting the protections of the attorney-client privilege to communications with a small number of people at the very top of an organization ignores the realities of how business is conducted by institutions today. It fails to recognize that day-to-day business decisions are made by lower level management and that the institution's business is conducted by operating personnel. These subordinate employees need to receive confidential legal counsel by attorneys fully knowledgeable in all facts pertinent to the subject matter of the legal advice. Denying the attorney-client privilege to attorneys' communications with such employees will impede this flow of information and legal advice critical to the lawful conduct of modern business.

Facts of pertinence to operation of public and private institutions

are possessed firsthand generally by subordinate personnel, not by those few members at the very top of the organization in its control group. The control group test presents a most unfair choice to attorneys and their organization clients -- either to investigate the facts fully from such subordinate personnel and thereby incur the risk that such facts will be susceptible to discovery from counsel, or to decline to investigate comprehensively and thereby render legal advice upon less than the complete factual picture. Moreover, even if the choice is made to interview subordinate personnel, these employees, knowing that their communications are not confidential, may naturally be reluctant to speak candidly. The net effect will be to make it more difficult to assure that an organization's

business is conducted in conformity with the law.

The narrow test adopted by the Court below conflicts with common-law principles sustaining application of the attorney-client privilege to communications with an attorney by an agent of the client. E.g., 8 J. Wigmore, Evidence § 2317, at 618 (J. McNaughton rev. 1961). The decision below clashes with the decisions of many State courts of this Nation that have followed this common-law rule. It clashes with the decisions of the Seventh and Eighth Circuits that have accorded greater protection to communications between subordinates of an organization and the organization's counsel. Harper & Row Publisher, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) (per curiam), aff'd by an equally divided Court, 400 U.S. 348 (1971); Diversified Industries,

Inc. v. Meredith, 572 F.2d 596, 606 (8th Cir. 1977) (en banc). The broader test of Diversified Industries should be adopted by this Court as the rule best accommodating all competing interests and thus most desirable "in the light of reason and experience." Rule 501, Federal Rules of Evidence.

## ARGUMENT

### I. THE NARROW, "CONTROL GROUP" TEST FOR APPLYING THE ATTORNEY-CLIENT PRIVILEGE TO COMMUNICATIONS BETWEEN ATTORNEYS AND THEIR CORPORATE CLIENTS WILL IMPEDE EFFECTIVE REPRESENTATION OF SUCH CLIENTS, CONTRARY TO THE PUBLIC INTEREST.

#### A. Effective And Responsible Legal Representation Of Any Client Begins With The Attorney Investigating And Discovering All Pertinent Facts That May Bear Upon The Matter Upon Which The Client Has Requested Legal Advice.

Selection, analysis, and understanding of the facts he or she professionally regards as pertinent is the law-

yer's invariable first step in serving the interests of his or her client. See, e.g., D. Binder & S. Price, Legal Interviewing and Counseling: A Client-Centered Approach 3 (1977); B. Shawcross, The Functions and Responsibilities of an Advocate 16 (1958); Justice Jackson, The Advocate: Guardian of Our Traditional Liberties, 36 A.B.A.J. 607, 610 (1950); see also L. Patterson & E. Cheatham, The Profession of Law 66 (1971). Such analysis of facts is an integral part of the legal evaluation process; and indeed it lies at the very heart of the attorney-client relationship:

> "A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal

> system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

ABA Code of Professional Responsibility, Ethical Consideration 4-1 (emphasis added); see also Hickman v. Taylor, 329 U.S. 495, 511 (1947); ABA Code of Professional Responsibility, Ethical Consideration 3-5. It is natural and inevitable for a lawyer, and an element in the exercise of his or her professional skill, to gather, assimilate, and analyze facts objectively before assuming the role of either counselor or advocate. In dispute resolution cases, for example, prospective litigants generally will not themselves know what, if

any, claims or defenses they may have and will come to a lawyer, present all facts, and let the lawyer decide which facts may be pertinent to legally sound claims or defenses. Only until initially confronting all the facts impartially can advocates competently tender partisan counsel regarding which claims or defenses are possible, which are likely to succeed, and which are likely to fail. This process can only be achieved through objective analysis of all the total factual circumstances made known to counsel and further disclosed by counsel's investigative efforts to learn the facts.

As this Court has long held, the very purpose of the attorney-client privilege is to facilitate this first stage of effective legal representation, learning the facts. E.g., Chirac v. Reinicker, 24 U.S. 474, 477, 11 Wheat.

280, 294 (1826); Blackburn v. Crawford's Lessee, 70 U.S. 186, 193, 3 Wall. 175, 192-193 (1865); Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U.S. 457, 458 (1876); Hunt v. Blackburn, 128 U.S. 464, 470 (1888); Alexander v. United States, 138 U.S. 353, 358 (1891); United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915); Fisher v. United States, 425 U.S. 391, 403 (1976). The privilege is society's recognition that, without the protection the privilege accords, a client may be reluctant to share with even his or her attorney all the facts possessing possible relevance to the client's legal problem. The restrictive test for protecting communications of the corporate client unnecessarily derogates this societal incentive to effective legal representation.

B. The Narrow, "Control Group" Test For Applying The Attorney-Client Privilege To Corporations Will Inhibit The Full Investigation And Discovery Of All Facts Bearing Upon The Matter Upon Which The Corporate Client Needs Legal Advice.

"The concept of the privilege to encourage consultation with an attorney to assure lawful conduct is as important to the corporation as it is to a natural person. Both need legal advice and representation and it is in the public interest that they have it." M. Ladd & R. Carlson, Cases and Materials on Evidence 335 (1972). What approach to the attorney-client privilege best implements this policy of encouraging lawful conduct? Clearly, a rule is necessary that accords more protection than the narrow, restrictive control group test adopted by the Court below.

A relatively unimpeded flow of

information and legal advice is critical to the lawful conduct of modern business. The complexity and wide-ranging scope of laws intended to regulate business affairs necessitate the rendering of uninhibited legal counsel to assure that the day-to-day operation of the business is in full compliance with the law. See Hercules Inc. v. Exxon Corp., 434 F.Supp. 136, 144 (D. Del. 1977), quoting United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358 (D. Mass. 1950); Note, The Attorney-Client Privilege and the Corporation in Shareholder Litigation, 50 S. Cal. L. Rev. 303, 306, 309 (1977). Increasing involvement of corporate counsel in the day-to-day business affairs of the corporation will further the public interest by making it easier to plan corporate affairs to avoid litigation. See SCM Corp. v. Xerox Corp., 70 F.R.D.

508, 513 (D.Conn. 1976). In situations potentially or actually involving litigation, an unimpeded flow of information enables the corporate attorney to interview employees in order to determine exactly what happened and to guage the various facets of the case. Weinschel, Corporate Employee Interviews and the Attorney Client Privilege, 12 B.C. Ind. & Com. L. Rev. 873 (1971).

Limiting the attorney-client privilege to communications with those at the very top of the corporate pyramid frustrates these objectives. The control group test ignores the fact that middle management executives, while not having the final word in major corporate issues, nevertheless play a major role in the decisionmaking process. Their advice may be sought by upper echelon executives, or they may in fact make decisions which are

only summarily approved by their superiors, or which need not be reviewed by their superiors at all. Weinschel, supra at 876. Manifestly these mid-level managers need to be able to communicate freely with corporate counsel as part of this decisionmaking process. In addition, because middle level executives and other subordinate corporate employees may often engage in acts for which corporate liability is sought, there is an obvious necessity for these individuals to communicate with corporate counsel. Indeed, if a corporate employee has the power to render the corporation liable for damages, should he not also have the power to make a confidential communication to, and receive confidential legal advice from, the company's counsel? See Note, Applicability of the Attorney-Client Privilege to Corporate Communications, 48 U. Cin.

L. Rev. 819, 822-823 (1979); McLaughlin, The Treatment of Attorney Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts, 26 The Record 30, 33 (1971). See also Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 608-609 (8th Cir. 1977) (en banc); Rule 801(d)(2)(D), Federal Rules of Evidence.

In corporations, those possessing firsthand knowledge of the facts upon which responsible legal advice must be based are not likely to be those representatives of the corporation found in the control group, but rather those mid-level managers and operating personnel in the company whose jobs are to conduct the day-to-day business of the company. See, e.g., Diversified Industries, supra at 608-609; In re Ampicillin Anti-

trust Litigation, 81 F.R.D. 377, 385-387 (D.D.C. 1978); Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1164-1165 (D.S.C. 1974). In antitrust and patent cases, for example, generally much of the critical sales and technical information necessary for responsible litigation or corporate counseling would be known only by the marketing and engineering "line" people -- not the members of the company's board of directors.

The evils of the narrow, control group test are that it presents unfair choices to attorneys and their corporate clients, and may prevent effective and responsible representation of corporations and frustrate attempts by corporations and their counsel to ensure that corporate action is taken in conformity with the law. When faced with the need to discover facts upon which to

render legal advice to the corporate client, counsel operating under the restrictions of the control group test must elect either to interview corporate representatives who are not in the control group, and thereby learn the facts but incur the risk that the attorney may be compelled to disclose these facts publicly because the interviews are not privileged; or to decline to interview these employees and render advice upon less than all the facts. Indeed, even in those occasions in which counsel and his corporate client choose to incur the risk of disclosure and proceed to interview employees who are not in the control group, such employees may be less than candid with counsel since they will not be speaking with any expectation that what they say will remain confidential.

Furthermore, the narrow, control

group test may mean that corporate employees not in the control group -- those mid-level managers and operating people closest to the daily business of the corporation -- may be deprived of legal advice with respect to the conduct of their day-to-day operations. Corporate counsel may be reluctant to provide such advice knowing that it is not confidential legal advice. If, for example, corporate counsel were to observe business practices as to which there conceivably might be a question of liability under the antitrust laws, counsel may be reluctant to point out ways in which the practices might be altered to resolve any doubt that they are prohibited under the antitrust laws, for fear that by doing so in a nonprivileged communication counsel will be flagging the problem and increasing the risk that legal action will be taken against his or her client.

Under the view of the privilege adopted by the Court below, even when legal advice is rendered directly to the control group, the restrictive notion of privilege may deny the benefits of that advice to those who are not in the control group. To be effective, communications from corporate counsel often require distribution within the company so that the advice may be effectuated. With the control group test, however, communications to others "down the chain of command" which relay or are based upon legal advice may constitute a publication waiving the attorney-client privilege. See, e.g., Natta v. Hogan, 392 F.2d 686, 693 (10th Cir. 1968). Under the circumstances, members of the control group, and their attorneys, may naturally be reluctant to communicate fully with lower level employees with respect to the subject

matter of the legal advice. The result will be diminished effectiveness in determining the corporation's response to legal advice.

In this regard, reducing the scope of the protection accorded corporations by the privilege will deter use by corporations of counsel to seek out and correct corporate wrongdoing. Any loss of this self-policing by corporations, with the alternatives being either absence of detection or detection by governmental agencies at a cost to the public fisc, is certainly not in the public interest. See Diversified Industries, supra at 610; Note, The Attorney-Client Privilege, the Self-Evaluative Report Privilege and Diversified Industries, Inc.

v. Meredith, 40 Ohio St. L.J. 699, 713 (1979).[2/]

The narrow, control group test conflicts with generally accepted, common-law principles concerning the proper application of the attorney-client privilege. In general, the privilege has been recognized to safeguard the confidentiality of communications made by agents of a client, for the client's benefit, to the client's

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2/ The use of lawyers to conduct analyses and reviews similar to that conducted by the attorneys for Petitioners in this case is common both to the Government and to private industry alike. See, e.g., In re Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979) (retention by corporation of outside law firm to conduct investigation and render advice regarding possible illegal payments to foreign officials by employees of the corporation); In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979) (same); "Westinghouse Seeks End to Cloud Caused By Suits Over Uranium Supply Contracts", Wall Street Journal, June 7, 1978, at 17, col. 1 (same); "Civil Service Hires Lawyer To Study Alleged Abuses", N.Y. Times. Nov. 5, 1977, at 8, col. 6 (retention of attorney "to conduct a 'comprehensive and independent inquiry'" into alleged abuses within the Civil Service Commission); (continued on next page)

counsel. E.g., 8 J. Wigmore, Evidence § 2317, at 618 (J. McNaughton rev. 1961);[3/]

(continued from page 22)
Diversified Industries, supra (retention by corporation of outside counsel to conduct an investigation and report to the board of directors concerning allegations of the commission of bribery by employees of the corporation); Herlihy & Levine, Corporate Crisis: The Overseas Payment Problem, 8 Law & Pol. Int'l. Bus. 547, 586-587 (1976) (retention by corporations of outside counsel to conduct independent investigations of possible management fraud); SEC Current Report, Form 8-K, Cities Service Co., Comm'n File No. 1-1093, at 1, 3, 5-6 (Sept. 1975) (retention by corporation of outside counsel to investigate possible illegal payments to foreign political entities and other illegal accumulations or use of corporate funds); CBS, Inc., "Report of Counsel, Investigation of Prize Money Descriptions With Respect to the 'Heavyweight Championship of Tennis' Matches" (July 1, 1977) (retention by corporation of outside counsel to conduct an investigation and report to management concerning allegations that tennis matches that were advertised and promoted as involving prize money to be awarded on a "winner-take-all" basis in fact involved prize money to be awarded proportionately to the losers as well as to the winners) (Report on file at Federal Communications Commission, Washington, D.C.).

3/ "The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by any form of agency employed or set in motion by the client is within the privilege.
(continued on next page)

Annot., Evidence: Attorney-Client Privilege as Applicable to Communications Between Attorney and Client's Agent, Employee, Spouse, or Relative, 139 A.L.R. 1250, 1251 (1942). So, too, employees of the corporation not in the control group should be entitled to speak confidentially to counsel for their principal, the corporate client. English authority has held communications between all company employees and company counsel to be protected by the attorney-client privilege when the communications relate to the subject matter as to which the company is seeking legal advice. E.g., Wilson v. Northhampton & Banbury Junction Ry., 14 Equity

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(continued from page 24)

"This of course includes communications through an interpreter, and also communications through a messenger or any other agent of transmission, as well as communications originating with the client's agent and made to the attorney." (Emphasis in original; footnotes omitted.)

Cases 477, 484 (1872). In this country, the great majority of the State courts that have considered the question have adhered to this "English Rule" and have not confined the attorney-client privilege to the select few members of an organization's control group. See, e.g., Jay v. Sears, Roebuck & Co., 340 So.2d 456, 457 (Ala. Civ. App. 1976); D.I. Chadbourne Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964); Bingham v. Walk, 128 Ind. 164, 27 N.E. 483 (1891); Graham v. Allis-Chalmers Manufacturing Co., 41 Del. Ch. 78, 188 A.2d 125 (1963); Fire Ass'n of Philadelphia v. Flemming, 78 Ga. 733, 3 S.E. 420 (1887); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942); Riddle Spring Realty Co. v. State, 107 N.H. 271, 220 A.2d 751 (1966); State v. Kociolek, 23 N.J. 400, 129 A.2d 417 (1957); Ford Motor Co. v.

O.W. Burke Co., 59 Misc.2d 543, 299 N.Y.S. 2d 946 (Sup.Ct. 1969); In re Hyde, 149 Ohio 407, 79 N.E.2d 224 (1948); Gass v. Baggerly, 332 S.W.2d 426 (Tex. Ct.Civ. App. 1960); Horlick's Malted Milk Co. v. A. Spiegel Co., 155 Wis. 201, 144 N.W. 272 (1913); contra Shere v. Marshall Field & Co., 26 Ill.App.3d 728, 327 N.E. 2d 92 (1974).[4/] This rule recognizing the

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4/ Six states, by statute, have modified this common-law rule in their jurisdictions by adopting Rule 502(a)(2) of the Uniform Rules of Evidence (1974), which defined "representative of the client" in "control group" terms, i.e., as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." 3A Ark. Stat. Ann. § 28-1001, Rule 502(a)(2); Me. Rev. Stat. Ann., Maine Rules of Evidence, Rule 502; Nev. Rev. Stat. § 49.075; N.D. Rules of Evidence, Rule 502; Okla. Stat. Ann. tit. 12, § 2502; S.D. Rules of Evidence § 19-13-2. This definition of "representative of the client" appeared in the Preliminary Draft of the Proposed Federal Rules of Evidence, 46 F.R.D. 161 (1969), but was eliminated by the Advisory Committee from the 1972 Final Draft of the Proposed Rules that was approved by this Court in 1972. No definition of "representative of the client" was contained in the Rules approved by this Court. See Advisory Committee's Note to Proposed Federal Rule of Evidence 503; see also 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 503[03] (1979).

need for corporate clients to speak confidentially, through agents, to corporate counsel was incorporated in model codes of evidence promulgated in 1942 and 1953. American Law Institute, Model Code of Evidence, Rule 209 (1942); National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence, Rule 26(3) (1953). And, of course, the Seventh and Eighth Circuits have applied broader, subject matter tests for the application of the privilege to corporations, rather than the narrow, control group test adopted by the Sixth Circuit below. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) (per curiam), aff'd by an equally divided Court, 400 U.S. 348 (1971); Diversified Industries, supra.[5/]

5/ For several decisions of District Courts applying the "subject matter" test, see Petitioners' Petition for a Writ of Certiorari at 8, note 1.

The Court below afforded scant discussion of its rationale for rejecting the broader, subject matter test consonant with these common-law principles. It assumed that, if the subject matter test were adopted, corporate members of the control group -- those at the very top of the corporation -- inevitably would seize upon that test in order "to shield themselves from information about possibly illegal transactions." United States v. Upjohn Co., 600 F.2d 1223, 1227 (6th Cir. 1979). The Court hypothesized that the control group would purposely insulate itself from the "full details" of the transaction which is the subject of the legal advice; and that corporate counsel thus would be "the exclusive repository of unpleasant facts," which would remain "undiscoverable." Id.

The Court's reasoning is an in-

adequate justification for so restricting the attorney-client privilege as applied to organizations. Even if the control group chose to act in the manner suggested by the Court below -- an unduly harsh assumption concerning the bona fides of high level corporate and agency officials -- the Court's concern that all facts would reside, undiscoverable, only with counsel, does not follow. The attorney-client privilege, properly applied, would not prevent inquiry directly of the corporate employees whom corporate counsel had interviewed; nor would it prevent discovery directly from the corporation of pertinent documentary evidence (other than written communications with counsel). E.g., 4 Moore's Federal Prac-

tice ¶ 26.60[2], at 26-233 to -234 (2d ed. 1979).[6/] Nor would it allow such documentary evidence to be shielded from disclosure by funnelling the evidence to corporate counsel. E.g., Grant v. United States, 227 U.S. 74, 79 (1913); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 324 (7th Cir.), cert. denied, 375 U.S. 929 (1963). The privilege would only prevent the unseemly scenario of corporate counsel becoming unwilling witnesses and sources of evidence against their clients. See Hickman v. Taylor, 329 U.S. 495, 516-518 (1947) (Jackson, J., concurring).

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6/ The Court below concluded that, in this case, the burden of this discovery from sources other than corporate counsel would be "severe." While this may be true in the particular circumstances of this case, this condition is hardly an adequate justification for enunciating a rule of general application which discounts the ability of a discovering party to obtain information from sources other than corporate counsel without doing violence to the attorney-client privilege.

We submit that the approach of the Eighth Circuit in Diversified Industries provides sufficient protection for the interests served by the attorney-client privilege while simultaneously recognizing the need for appropriate discovery in litigation. The Diversified Court held that communications between all corporate employees and corporate counsel may be privileged if "(1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need

to know its contents." Diversified Industries, supra at 609. See also 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 503(b)[04] (1979). The Diversified test provides a protection that is more in tune with the legal needs of corporations and of the role of the corporate attorney today. We urge that it be adopted by this Court.

## II. THE NARROW, "CONTROL GROUP" TEST FOR APPLYING THE ATTORNEY-CLIENT PRIVILEGE SHOULD BE REJECTED BECAUSE IT WOULD ADVERSELY AFFECT THE REPRESENTATION OF FEDERAL AGENCIES.

The structure and operation of Federal agencies make them as subject as corporations to the pernicious consequences of the restrictive "control group" test for defining the limits of the attorney-client privilege. This is an additional reason why this test should not be approved by this Court.

Agencies, like corporations, are not characterized by one, small group of upper-level managers conducting the agencies' day-to-day business. Decision-making authority is decentralized and diffused, so that the day-to-day decisions are made by middle and lower level management. See, e.g., Wallace, A New Test for Management by Objectives, 2 The Bureaucrat 362, 366 (1974); W. Gellhorn & C. Byse, Administrative Law 103 & n.9, 109 (5th ed. 1970); H. Hensel & J. Millett, Departmental Management in Federal Administration 33-35, 42 (1949); see also P. Drucker, Management: Tasks, Responsibilities, Practices 136 (1974). There simply is no readily identifiable "control group" of upper management with the expertise and time to direct all individual facets of the day-to-day affairs of the agency. Nor would it be a desirable system for managing the agencies if there were.

See Drucker, supra at 555 ("[a] structure that forces decisions to go to the highest possible level of organization rather than be settled at the lowest possible level is clearly an impediment").

This realistic view of how agencies are managed dictates that there be assurance that agency counsel may freely and effectively advise middle management and other subordinate employees without the inhibitions that will attend if the control group test is at play. Agency lawyers, like their corporate counterparts, should not have to confront the Hobson's choice of foregoing complete oral or written communications with middle level managers or operating personnel, for fear that the substance of these communications will not be privileged, and thereby basing their legal advice upon incomplete data, or engaging in

such communications and thereby incurring the risk of subsequent disclosure. Middle level managers and other subordinate agency personnel must not feel inhibited by fear that communications are not privileged; they must be free to be candid with their counsel, to share all facts with their attorneys, so that agency counsel may render responsible legal advice, based upon all pertinent data, to these employees, as well as to those at the top of the agency management. And we should expect no less if our agency decisions are to have rational bases. See 5 U.S.C. § 706(2).

The control group test will also adversely impact upon agencies in litigative contexts. All the facts which need to be known by attorneys representing agencies are not known, firsthand, by the small control group of managers at the

very head of the agency. They may be known by middle level managers and operating people. This is a fact of life common to agencies as well as corporations; and the restriction of the attorney-client privilege solely to communications from the control group would hamper effective litigation counseling and representation in court. Agencies and corporations alike would experience the same inhibitions chilling frank disclosure to attorneys; there would be the prospect of attorneys, by conscious decision or by the force of this reluctance of agency employees to speak frankly, furnishing legal representation with less than complete knowledge and understanding of the controversy.

Should this Court affirm the decision below, the spectre of lower courts applying the control group test to Federal

agencies is not a fanciful one. Courts have recognized the similarities between agencies and corporations, and have accordingly applied the same rules or tests for each when applying the attorney-client privilege. See, e.g., Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wash. 1975); see also Coastal States Gas Corp. v. United States Department of Energy, No. 79-2181, slip op. at 15 (D.C. Cir. Feb. 15, 1980); Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242, 254 n.25 (D.C. Cir. 1977). Unless this Court expressly instructs otherwise, the similarities in the structure and operation of corporations and Federal agencies are so great that lower courts may find no logical distinction precluding application of the control group test to agencies. The adverse consequences of the control group

test thus would be compounded, for the negative impact upon Federal agencies, charged with service in the public interest, would be injurious to the Nation. To the extent the control group test would influence negatively the rendering of effective and responsible counsel to Federal agencies, the American public would be the loser.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed insofar as it adopts the "control group" test for the application of the attorney-client privilege, and the cause remanded with instructions that the Court apply the standard adopted in Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 606 (8th Cir. 1977) (en banc).

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June 16, 1980

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-886.

THE UPJOHN COMPANY AND GERARD THOMAS, VICE PRESIDENT, SECRETARY AND GENERAL COUNSEL,

PETITIONERS,

*v.*

UNITED STATES OF AMERICA, AND DAVID E. NOWAK, SPECIAL AGENT, INTERNAL REVENUE SERVICE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

[redacted] **Brief of Amicus Curiae New England Legal Foundation in Support of Petitioners.**


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RULES.

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Miller, The Corporate Attorney-Client Privilege and the Work Product Doctrine: Protection from Compelled Disclosure in Criminal Investigation of a Corporation, 12 U.S.F. L. Rev. 569 (1978) 9n.

Note: Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424 (1970) 12n.

Note: The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 Harv. L. Rev. 464 (1977) 7n.

Note: The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach, 69 Mich. L. Rev. 360 (1970) 9n.

Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953 (1956) 9n., 12n.

The Securities and Exchange Commission: Proposals Concerning Disclosure of Relationships Between Attorneys and Registered Corporations, 44 Fed. Reg. 44,881, 44,882 (1972) 19n.

Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B.C. Ind. & Comm. L. Rev. 873 (1970) 14n.

J. Weinstein and M. Berger, 2 Weinstein's Evidence ¶ 503[02], 503-15 (1979) 20n.

8 Wigmore, Evidence, § 2290 (McNaughton Rev., 1961) 6n.

§ 2291 10n.

§ 2292 6n.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-886.

THE UPJOHN COMPANY AND GERARD THOMAS,
VICE PRESIDENT, SECRETARY AND
GENERAL COUNSEL,

PETITIONERS,

*v.*

UNITED STATES OF AMERICA, AND
DAVID E. NOWAK, SPECIAL AGENT,
INTERNAL REVENUE SERVICE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## Motion of New England Legal Foundation for Leave to File Brief as Amicus Curiae.

Pursuant to Rule 42 of the Rules of the Supreme Court, New England Legal Foundation moves the Court for leave to file its brief as amicus curiae bound with this motion in support of petitioners.

New England Legal Foundation has the consent of counsel for petitioners and counsel for respondents to the filing of this brief. Copies of the letters of counsel granting consent are on file with the Clerk of the Court.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the broad public interest. Policy for NELF is set by a board of directors composed of New England citizens, the majority of whom are

attorneys. The board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The issues in this case are of particular concern to NELF's board of directors. NELF numbers among its directors, the general counsels of five major New England corporations and two partners in major law firms, all of whom act as counsel for corporations and all of whom will be affected in their professional capacities by the rule formulated in this case. The existing conflict between the Circuits severely impedes their ability to effectively discharge their professional responsibility to the corporations they represent.

NELF's attorneys participated as amicus curiae in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), *Cary v. Brown,* 79-703 (1979), and *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York,* 79-134 (1979). The Foundation, due to its unique public interest perspective and the interest of its members in the scope of the attorney-client privilege as it applies to corporations, believes that it can provide the Court with a more complete argument of the issues in this case.

The Foundation is particularly concerned that if the ruling of the United States Court of Appeals for the Sixth Circuit is allowed to stand, counsel and their corporate clients will remain without definitive guidance on an important and fundamental legal principle.

For the foregoing reasons New England Legal Foundation respectfully requests permission to participate as amicus curiae and to file the attached brief in support of petitioners.

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## Brief of New England Legal Foundation in Support of Petitioners.

### Introductory Statement.

Part I of this brief will discuss the history and rationale of the attorney-client privilege. Part II will survey the application of the privilege to corporations and the conflicting rules applied by the United States Circuit Courts of Appeal. Finally, Part III recommends that the Court adopt the subject matter test as the test which is most consistent with the role of attorneys in an adversary system.

The decision of the Sixth Circuit Court of Appeals here at issue illustrates the conflict among the Circuits which has left counsel without a definitive standard to apply when advising corporations on legal matters. Corporations have a central

role in the economy of the United States. The issue before the Court will have a far-reaching impact on the manner in which corporations are governed and on the economic health of the nation.

New England Legal Foundation adopts petitioners' statement of the opinion below and petitioners' statement of facts.

## Question Presented.

Whether the attorney-client privilege protects the confidentiality of communications between attorneys for corporations and corporate employees.

## Summary of Argument.

New England Legal Foundation argues as follows:

1. The attorney-client privilege is a fundamental part of the system of judicial administration. Any restriction upon the privilege in the corporate context impairs the ability of corporations to obtain legal advice and the ability of counsel to function in our adversary system.
2. The control group test adopted by the Sixth, and other Circuits, inhibits corporate government and is at odds with the public policies upon which the attorney-client privilege is based.
3. The subject matter test is consistent with the responsibilities of lawyers to their clients, both public and private, and with the objectives of the attorney-client privilege.

## Argument.

### I. The Attorney-Client Privilege: Rationale.

The attorney-client privilege is the oldest of the privileges

for confidential communications.[1] Originally derived from the status of the attorney as a professional, the privilege was based on the "oath and the honor" of the attorney[2] and belonged to the attorney, not the client. In general, Professor Wigmore's classic statement of the privilege is the one followed by the law today:

> Where legal advice of any kind is sought . . . from a professional legal advisor in his capacity as such . . . the communications relating to that purpose . . . made in confidence by the client . . . are at his instance permanently protected from disclosure . . . by himself or by the legal advisor . . . except the protection be waived.[3]

Since the late 1700's the privilege has rested upon two related assumptions, both based on public policy considerations. The first is that there is a need to remove the client's apprehension of compelled disclosure by the attorney he has consulted or retained. The purpose of the privilege is to enable the client to obtain the best possible legal advice based on counsel's fullest understanding of the facts, and the scope of the privilege must be such that it will encourage clients to make full disclosure to their attorneys. Under this theory, the privilege belongs to the client, not the attorney. *Fisher v. United States,* 425 U.S. 391, 403 (1976).

The second assumption is that unfettered communication between client and attorney enables the latter to act effectively and responsibly on behalf of his client. This assumption is based on the belief that the societal goal of achieving justice in an adversary system is best served by fully informed, responsible advocates.[4]

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[1] 8 Wigmore Evidence, § 2290 (McNaughton Rev., 1961).

[2] *Id.*

[3] *Id.*, § 2292.

[4] See generally, J. Weinstein and M. Berger, 2 Weinstein's Evidence ¶ 503[02], 503-15 (1979).

Early case law reflects a judicial concern for the privilege as a means of increasing the lawyer's ability to give complete, competent advice in complex civil litigation. In *Rochester City Bank v. Suydam, Sage & Co.*, 5 How. Pr. 254 (N.Y. S.Ct. 1851), the court asserted that the privilege is required solely for the purpose of managing litigation:

> If the facts thus communicated were liable to be extorted from the attorney or counsel, suitors would hesitate to employ them, to the great inconvenience of the court, and obstruction of judicial business. The rule we are considering, therefore, was adopted to remove this difficulty. 5 How. Pr. 254, at 258-59.

Similarly, in *United States v. Louisville and Nashville Railroad Company*, 236 U.S. 318 (1915), this court stated:

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance. 236 U.S. at 336.

The objectives of the privilege, both as a means of fostering legal communication and as a method of case management central to the administration of justice have remained virtually unchanged since the middle of the nineteenth century.[5] The privilege is a fundamental part of this nation's judicial system:

> Our adversary system of litigation casts the lawyer in a role of fighter for the party he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change

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[5] See Note: The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 Harv. L. Rev. 464 (1977).

> our customs so as to make the lawyer amiable to routine examination upon the client's confidential disclosures regarding professional business.[6]

It is well established that the privilege applies to corporations, as well as to individuals. *Zenith Radio Corp. v. Radio Corp. of America,* 121 F. Supp. 792 (D. Del. 1954); *United States v. United Shoe Machinery Corp.,* 99 F. Supp. 357 (D. Mass. 1950). In 1962, a district court held, in *Radiant Burners, Inc. v. American Gas Association,* 207 F. Supp. 771 (N.D. Ill. 1962), that the privilege did not apply to corporations. *Radiant Burners* was reversed on appeal. 320 F. 2d 314 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963). The court stated that "based on history, principle, precedent and public policy the attorney-client privilege . . . is available to corporations." 320 F. 2d at 323. The Seventh Circuit held that the attorney-client privilege does not exist out of a personal right, but rather as a rule based on public policy, to facilitate the administration of justice:

> A corporation is entitled to the same treatment as any other "client"—no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure, absent its waiver thereof. 320 F. 2d at 324.

Although courts have embraced different approaches in defining the scope of privilege when the client is a corporation, the rationale of the privilege in the corporate context remains basically unchanged. The privilege applies to corporations, as well as to individuals, on the utilitarian assumption that the administration of justice, and the ability of counsel

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[6] McCormack, Evidence § 87 at 176 (1972).

to provide competent legal representation cannot be met without it.[7]

The difficulties encountered by courts in the application of the privilege to corporations stem not so much from a need to redesign the privilege as from a failure to recognize that the primary purpose of the privilege is to facilitate the giving of reasoned, effective legal advice, necessary to insure compliance with the myriad laws affecting corporations. The conflicting views among federal courts on the scope of the corporate privilege is the result of a legal fiction, i.e., that the corporate "client" is by definition different than the individual client. The Sixth Circuit's opinion in *United States v. Upjohn Co.*, 600 F. 2d 1223 (1979) is, in fact, based on this misconception.

> The application of the privilege to corporate "clients" poses a somewhat different problem. Since corporations are inanimate, artificial entities, the attorney-client relationship is conceptually more difficult, and its underlying principles are less obvious. 600 F. 2d at 1226.

This view of the scope of corporate attorney-client privilege is based on the unwarranted assumption that the lawyer's function when his client is a corporation, is qualitatively different from his function when his client is an individual.

> As clients, corporations can communicate to attorneys only through agents. ... [M]arketing officials have knowledge and duties related only to selling, while plant supervisors have knowledge and duties related only to production. It is only the senior management, guiding

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[7] There seems little doubt that the privilege applies to corporations. Note: The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach, 69 Mich. L. Rev. 360 (1970); Comment: The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics and Its Possible Curtailment, 56 N.W.U. L. Rev. 235 (1961); Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953 (1956).

> and integrating the several operations, which can be said to possess an identity analogous to the corporation as a whole. 600 F. 2d at 1226.

The analysis of the Court below is simply inaccurate. The Court attempts to define the corporate "client" in terms analogous to individuals, and ignores the fact that the policies underlying the privilege have changed. Today, the privilege is not only designed to promote disclosure by clients to their attorneys, but also to take account of the day-to-day workings of a lawyer. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164 (D. S.C. 1974). Because it is difficult to ascertain whether the privilege does, in fact, promote disclosure, there is a third policy that the privilege ought to be "strictly confined within the narrowest limits consistent with the logic of its principle."[8]

The conflict inherent in these policies is not present when the client is an individual, but when the client is a corporation, operating through agents and employees, the policies collide and lead to judicial confusion. This confusion stems from the failure of courts to recognize the privilege as an instrument of judicial administration. Counsel play a crucial administrative role in the judicial system, and the single most compelling reason for the attorney-client privilege is to permit counsel to discharge his professional responsibilities in that system.

The decision of the court of appeals here in issue illustrates this confusion. In *United States v. Upjohn Co., supra,* the court stated:

> This policy of promoting full disclosure to counsel serves to implement the notion . . . that finding the truth and achieving justice in an adversary system are best served by fully-informed advocates loyal to their client's interests. 600 F. 2d at 1226.

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[8] Wigmore, § 2291 at 554.

Thus, the court first acknowledges the instrumental purpose of the privilege and then applies the privilege in a manner which destroys counsel's ability to meet his responsibilities to either his client or to the judicial system. The decision of the court below represents a substantial departure from the policies underlying the privilege and seriously impairs the ability of counsel to function in an adversary system.

## II. The Control Group Test.

While it is settled that the attorney-client privilege applies to corporations, there are now conflicting views among the circuit courts as to the scope of the privilege. In *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom., General Electric Co. v. Kirkpatrick,* 312 F. 2d 742 (3d Cir. 1962), *cert. denied,* 372 U.S. 943 (1963), the court first set forth the "control group" test adopted by the Sixth Circuit in the case at bar. Subsequently, the test was adopted by the Tenth Circuit in *Hogan v. Zletz,* 43 F.R.D. 308 (N.D. Okla. 1967), *aff'd. sub nom., Natta v. Hogan,* 392 F. 2d 686 (10th Cir. 1968). Under *City of Philadelphia v. Westinghouse Electric Corp., supra,* an employee's statement to corporate counsel is not considered a confidential attorney-client communication unless the employee:

> is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, of if he is an authorized member of a body or group which has that authority. 210 F. Supp. at 485.

The control group test is based on a view of the attorney-client privilege as a personal privilege. *Radiant Burners Inc. v. American Gas Association, supra.* The "control group" of a corporation, normally consisting of its board of directors

and chief officers, is regarded as that group of people in a company that is most analogous to an individual client, because it is the responsibility of the officers and directors "to fear for the well-being of the corporation just as an individual fears for his own well-being."[9]

The protection of the attorney-client privilege is limited under the test to communications between senior management and counsel.[10] The test assumes that, in its absence, corporations would create a "zone of silence" around corporate affairs.

> Where corporations are involved, with their . . . masses of documents, and frequent dealings with lawyers, the zone of silence grows large. Few judges . . . would long tolerate any . . . privilege that allowed corporations to insulate all their activities by discussing them with legal advisors.[11]

Arguing inconsistently that the scope of the privilege should be limited to its purpose because the privilege acts as "a bar to the truth" the Sixth Circuit held in the instant case that the test actually promotes consultation with counsel and thereby achieves the objective of the privilege. *United States v. Upjohn Co., supra,* 600 F. 2d at 1227.

Yet the test has been criticized as reflecting a restricted view of corporate management unrelated to the purposes of

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[9] Miller, The Corporate Attorney-Client Privilege and the Work Product Doctrine: Protection from Compelled Disclosure in Criminal Investigation of a Corporation, 12 U.S.F. L. Rev. 569, 572 (1978).

[10] See, e.g., *Garrison v. General Motors Corp.*, 213 F. Supp. 515, 518 (S.D. Cal. 1963), in which the control group was held to include directors, officers, department heads, division managers and their assistants and division chief engineers.

[11] Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953, 955-56 (1956). See generally, Note: Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424 (1970).

the attorney-client privilege. In 1970 the Seventh Circuit in *Harper & Row Publishers, Inc. v. Decker,* 423 F. 2d 487 (7th Cir. 1970), affirmed by an equally divided court, 400 U.S. 348 (1971), rejected the control group test. The court adopted a broader and more balanced test for application of the attorney-client privilege to corporations. Under *Harper & Row, supra,* the privilege applies to corporations (1) if the employee, though not a member of the corporation's control group, makes a communication at the direction of his superiors in the corporation and (2) the subject matter of the communication is the performance by the employee of the duties of his employment. 423 F. 2d at 491-492.

This approach has been criticized as susceptible to abuse in litigation. The court below expressed the fear that *Harper & Row* would allow corporations to direct employees to channel all business reports to corporate attorneys, thereby rendering all such information privileged. *United States v. Upjohn Co., supra,* 600 F. 2d at 1227.[12]

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[12] This fear is ill-founded given the fact that business records are not immune to discovery. In *United States v. United Shoe Machinery Corp.,* 89 F. Supp. 357 (D. Mass. 1950), Judge Wyzanski set forth the requisites of a justified claim of the attorney-client privilege:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. 89 F. Supp. at 358-359.

Business records routinely mailed to counsel to protect them from discovery would not meet this test.

In *Diversified Industries, Inc. v. Meredith,* 572 F. 2d 596 (8th Cir. 1977), the Eighth Circuit also rejected the control group test and adopted the subject matter test:

> [T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. 572 F. 2d at 609.

*Diversified Industries* represents the better approach to application of the privilege to corporations. The court in *Diversified Industries* recognized the need of counsel to obtain information from middle management and non-management personnel.[13] The court reasoned that:

> [T]he control group test inhibits the free flow of information to a legal advisor and defeats the purpose of the attorney-client privilege [citation omitted]. Moreover, the test may result in discouraging communications to lawyers made in a good faith effort to promote compliance with the complex laws governing corporate activity. 572 F. 2d at 609.

The distinction between the control group test and the subject matter test is the extent to which confidential employee communications to counsel are protected by the corporate attorney-client privilege. In the instant case, the court chose the control group test because:

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[13] Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B.C. Ind. & Comm. L. Rev. 873 (1970).

> The "subject matter" test encourages senior managers purposely to ignore important information they have good business reasons to know and use. *United States v. Upjohn Co., supra,* 600 F. 2d at 1227.

The court further stated:

> The "control group" test recognizes that a corporation's decision-makers, like individual clients, must communicate freely and confidentially to counsel. By protecting these communications, the "control group" test promotes consultation with counsel and thereby achieves its objective. 600 F. 2d at 1227.

The court also noted that application of subject matter test to corporations could result in counsel being the exclusive repository of unpleasant facts. 600 F. 2d at 1227. In the Sixth Circuit's view a party seeking discovery, in a subject matter test jurisdiction, would be forced to depose or otherwise interrogate less senior employees rather than management. The court opted for the control group test on the theory that the subject matter test would impose too heavy a discovery burden on opposing counsel.

This theory is at best illogical. It is based on factors relating to discovery and not upon the policies underlying the attorney-client privilege. The privilege protects communication regardless of the ease with which an adversary can obtain discovery. Moreover, the control group test does not accomplish its objective as a discovery tool. Since the test does not protect communications from lower-level employees to corporate counsel, it is difficult to fathom why such communications should be made. Even assuming that the communications are made, opposing counsel, faced with a choice of interrogating knowledgeable lower-level employees or management which is only dimly aware of the facts, would invariably opt for the former. The attorney-client privilege protects confidential communications whether or not the in-

formation can be obtained from an unprivileged source. The relative burden of discovery in an adversary system is not therefore a basis for destroying the privilege.[14]

The Third Circuit has also adopted the control group test which it recognized as affording the corporation the bare minimum of protection. In *In re Grand Jury Investigation,* 599 F. 2d 1224 (3d Cir. 1979), the court rejected the practical problem acknowledged in *Diversified Industries, supra,* that counsel may have to obtain "information relevant to a legal problem from middle management and nonmanagement personnel as well as from top executives," and therefore that a restrictive test for the attorney-client privilege might inhibit the free flow of information to counsel. 572 F. 2d at 608-09.

In the view of the Third Circuit, the privilege belongs to the corporation, and employees who communicate with counsel do so at their own risk because such communications would not be privileged. The court assumed that innocent employees would communicate with counsel even absent the privilege. Finally, the Third Circuit also rejected the subject matter test because the public policies advanced by that test were adequately protected by the work product doctrine. *In re Grand Jury Investigation, supra,* 599 F. 2d at 1237.

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[14] The decision of the court below ignores the discovery mechanisms available to litigants under the Federal Rules of Civil Procedure. Rule 26(b)(3) requires the production of all documents relevant to the litigation. Rule 33 requires a corporation to assemble and provide all information in the possession of its employees. Under Rule 30(b)(6), a corporation may be required to designate a witness or witnesses to testify to matters "known or reasonably available to the organization."

Attempts to circumvent the rules of discovery by forcing corporate counsel to testify or surrender notes and memoranda arise with increasing frequency. See, e.g., *In re Grand Jury Proceedings,* 604 F. 2d 798 (3d Cir. 1979); *In re Grand Jury Subpoena etc.,* 599 F. 2d 504 (2d Cir. 1979).

The holdings of the Third and Sixth Circuits confuse the corporate attorney-client privilege with the work-product doctrine. The work-product doctrine protects from discovery materials prepared or collected by an attorney "in the course of preparation for possible litigation." *Hickman v. Taylor,* 329 U.S. 495, 505 (1947). As currently embodied in Rule 26(b)(3), Federal Rules of Civil Procedure, the doctrine also protects against discovery of "the mental impressions, conclusions, opinions, or legal theories of an attorney." The work-product doctrine may be overcome upon a showing that a party "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain . . . the materials by other means." Rule 26(b)(3), Federal Rules of Civil Procedure. The work-product doctrine is qualified; the attorney-client privilege is not. Materials otherwise protected may be discoverable under the work-product doctrine whereas communications within the attorney-client privilege may not be. In brief, the attorney-client privilege is not a discovery mechanism.

To the extent that the scope of the attorney-client privilege in a corporate setting turns upon well-established public policy considerations, there is little doubt that the control group test should be rejected by this Court. The application of this fundamental rule of law should not be subject to disparate results based on choice of forum. The test is inconsistent with the policies on which the privilege is based and fails to recognize the organizational and operating structure of the modern corporation. More important, corporate lawyers play an important role in policing corporate conduct, and to the extent that counsel may be unable to properly represent his client in a control group jurisdiction, the interests of justice will not be served. *A.B. Dick Co. v. Marr,* 95 F. Supp. 83, 102 (S.D. N.Y. 1950), *appeal dism'd.,* 197 F. 2d 498 (2d Cir. 1952), *cert. denied,* 344 U.S. 878 (1952).

## III. This Court Should Adopt the Subject Matter Test.

The public policy underpinnings of the attorney-client privilege are strongest in the corporate area. Unlike individuals, corporations have a continual need for legal advice and a need for predictability in their relations with lawyers.

In the modern corporation, executives are not involved in the day-to-day operations, but rather the ultimate responsibility for decisions, including legal analysis, is often delegated to subordinate employees. Senior management receives information from division heads, salesmen and counsel. Most of the legal advice obtained by management is not in anticipation of litigation but rather reflects good management.

In a control group jurisdiction, counsel is presented with an inherent contradiction in his role as legal advisor. Counsel either advises the corporation without all of the relevant facts or obtains the information from corporate employees at the risk of having to divulge it to his adversary. At the very least, counsel should be confident that his efforts to assemble information will not prove detrimental to his client. The test adopted by the court below places counsel in an uncertain position with management which adversely affects corporate government. As applied in the instant case, the test not only inhibits the flow of information between the company and counsel, it also establishes the directors, officers, division heads and counsel as enclaves of adverse interest. The test imposes an artificial mode of management, incapable of precise definition and impossible of practical application. Because there is no definable control group in every corporation, courts will have to redefine the scope of the privilege in each case in which it is questioned.

Corporations are increasingly subject to regulation and counsel plays an important role in assuring compliance with

regulatory schemes. The public, as well as regulators, expect counsel to detect and prevent illegal business activities across a broad spectrum of the law.[15] *Diversified Industries, Inc. v. Meredith, supra,* 572 F. 2d at 609. Without information, counsel will be inhibited in his efforts to obtain compliance with the laws regulating corporate conduct.

The subject matter test is consistent with both the rationale of the attorney-client privilege and the role of counsel in an adversary system. The subject matter test protects communications between the corporate attorney and corporate employees when the communication is made at the direction of the employee's superiors and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. *Harper & Row Publishers, Inc. v. Decker, supra.*

As expanded in *Diversified Industries, Inc. v. Meredith, supra,* the test also includes a requirement that the communication directed by corporate superiors and made by the lower-level employee be for the purpose of securing legal advice. 572 F. 2d 596, 609. The court in *In re Ampicillin Antitrust Litigation,* 81 F.R.D. 377 (D. D.C. 1978) added an additional requirement. Only those communications which are believed to be relevant to a particular legal problem are within the privilege. 81 F.R.D. at 387.

It is imperative that the corporate lawyer obtain information from those employees immediately involved in the problem area. Since the employees who have knowledge of the facts will rarely be officers or directors, the subject matter test logically focuses on the subject matter of the communication and the context in which the communication was made

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[15] See, e.g., The Securities and Exchange Commission: Proposals Concerning Disclosure of Relationships Between Attorneys and Registered Corporations, 44 Fed. Reg. 44,881, 44,882 (1972).

rather than defining the privilege in terms of the corporate status of the employee. And as the court noted in *In re Ampicillin Antitrust Litigation, supra,* by limiting the privilege to those communications believed to be relevant to a legal issue, the subject matter test takes into account the corporate business form while

> strik[ing] a balance between the privilege's goal of promoting freedom of consultation and full disclosure between an attorney and a seeker of legal services, and the law's need for relevant evidence. 81 F.R.D. at 387.[16]

The importance of predictability in the application of the corporate attorney-client privilege cannot be overemphasized. Attorneys will have to communicate with a number of corporate employees, particularly when complex litigation is involved. If such communications are never privileged then the purpose of the privilege, to promote full and frank discussion is defeated. *In re Ampicillin Antitrust Litigation,* 81 F.R.D. 377 (1978); *Burlington Industries v. Exxon Corporation,* 65 F.R.D. 26 (D. Md. 1974).

At a minimum, counsel should have a reasonable certainty at the time the communication is made that it will be within the privilege. The subject matter test provides such predictability and is, therefore, in accord with the policies which this court has recognized as the basis of the privilege.

**Conclusion.**

Corporations have demonstrated unprecedented success as economic vehicles. That success is not a sufficient ground for destroying the attorney-client privilege or the public policies upon which it is based. The control group test threatens the ability of corporations to comply with all regulation. It is not

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[16] 2 Weinstein's Evidence, ¶ 503(b)[04] at 503-44 (1979).

simply a judicially created rule, designed to ease the relative burden of discovery, but rather, in its practical implications, threatens the very existence of the modern corporation.

The public interest will be served best by the pronouncement by this Court of a clear standard for the corporate attorney-client privilege in a manner consistent with the role of counsel in an adversary system.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY and GERARD THOMAS,
Vice President, Secretary and General Counsel,

*Petitioners*,

—v.—

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,

*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF *AMICI CURIAE* FOR THE COMMITTEE ON FEDERAL COURTS AND THE COMMITTEE ON CORPORATE LAW DEPARTMENT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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## BRIEF *AMICI CURIAE* FOR THE COMMITTEE ON FEDERAL COURTS AND THE COMMITTEE ON CORPORATE LAW DEPARTMENT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Committee on Federal Courts and the Committee on Corporate Law Department of the Association of the Bar of the City of New York (the "Committees"), *amici curiae* by consent of the parties, respectfully submit this brief to address two issues of signal importance to the bar and to the administration of justice: (i) the scope of the attorney-client privilege as it

relates to communications between lawyers and their corporate clients; and (ii) the applicability of the work product doctrine in administrative summons proceedings such as that at bar. We urge the Court (i) to reject the "control group" test of the attorney-client privilege adopted below and instead to apply the "subject matter" test that has been accepted by two other United States Courts of Appeals and by many other courts; and (ii) to hold that the work product privilege is available in this summons proceeding just as in any other lawsuit or proceeding.

## OPINIONS BELOW AND JURISDICTION

The opinion of the Court of Appeals is reported at 600 F.2d 1223 (6th Cir. 1979). The opinion of the United States Magistrate is unofficially reported at 41 A.F.T.R.2d 78-796 and 78-1 U.S.T.C. ¶ 9277. Neither the order of the District Court adopting the Magistrate's opinion nor the order of the District Court enforcing the summons is officially reported.

A petition for certiorari was filed within ninety days of the denial by the Court of Appeals of a petition for reconsideration. The petition for certiorari was granted on March 17, 1980. 100 S. Ct. 1310. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between an attorney for a corporation and an employee of that corporation when (a) the employee, although himself perhaps not a member of the corporation's "control group," makes the communication at the direction of his superiors in the

corporation, (b) the subject of the communication is a matter about which the attorney's advice has been sought by the corporation, and (c) the communication relates to the performance by the employee of the duties of his employment.

2. Whether documents that would be protected against disclosure by the work product doctrine if sought by judicial process are similarly protected under that doctrine when sought by an administrative summons.

## STATEMENT OF THE CASE

### The Facts

In January 1976, outside auditors for The Upjohn Company ("Upjohn" or the "Company"), in the course of auditing one of Upjohn's foreign subsidiaries, discovered that the foreign subsidiary was making payments to foreign government employees and others in order to secure government business. The auditors reported these questionable payments to Gerard Thomas, Upjohn's general counsel, and to other management officials. After consultation with Upjohn's board chairman and outside counsel—and long before any governmental investigation had begun—Mr. Thomas and Upjohn's outside counsel conducted an internal investigation to determine the nature and extent of the questionable payments. 41 A.F.T.R.2d at 78-798.

The District Court, by adopting the Magistrate's report, found that the purpose of the investigation was to enable Mr. Thomas and outside counsel "to be in a position to give legal advice to the Company. . . ." *Id.* *See* 78-1 U.S.T.C. ¶ 9437.

In their investigation, Mr. Thomas and the outside attorneys sent a questionnaire to the managers of Upjohn's 53 foreign affiliates that elicited information about questionable payments. The questionnaire responses have been treated as confidential. In addition, counsel interviewed all of the people to whom the questionnaire was sent, as well as some other employees. Counsel's notes of those interviews contained, among other things, counsel's thoughts concerning the importance of certain subjects, how those subjects related to other subjects, and what additional information counsel thought important to obtain. 41 A.F.T.R.2d at 78-798 to 78-799.

The Company's attorneys then recommended that Upjohn make a preliminary report to the Securities and Exchange Commission ("SEC") regarding the questionable payments. The report was made promptly, both to the SEC and to the Internal Revenue Service ("IRS"). Later, after additional information had been obtained, Upjohn made more complete reports to the SEC and to the IRS. *Id.*

Prior to the filing of Upjohn's initial report to the SEC, the IRS had been auditing the Company's 1972 and 1973 income tax returns. The audit had almost been concluded when the IRS received a copy of the initial report to the SEC. In consequence, the audit was not closed and the matter was referred to the IRS's Intelligence Division, which undertook an investigation for the years 1972 through 1974. 41 A.F.T.R.2d at 78-799.

Upjohn cooperated with this investigation. It advised the IRS of the nature and extent of its internal investigation, and it provided the IRS with copies of

the documents—invoices, vouchers, checks, and other materials—that Upjohn had discovered during its own investigation. Upjohn also provided the IRS with a list of the persons whom Upjohn's counsel had interviewed, and Upjohn agreed to make available to the IRS all the persons who were interviewed by Upjohn's counsel and who still were employed by the Company. Upjohn refused, however, to give the IRS the notes of counsel's interviews and the responses to counsel's questionnaire. Also, Upjohn declined voluntarily to permit questions as to matters that did not affect its consolidated federal income tax returns. 41 A.F.T.R.2d at 78-799.

The IRS interviewed some of the Upjohn employees and then issued a summons to Upjohn pursuant to 26 U.S.C. § 7602.[1] 41 A.F.T.R.2d at 78-797, 78-799. The

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1 26 U.S.C. § 7602 provides:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

summons sought production, *inter alia*, of the notes taken by Upjohn's counsel and the responses to the questionnaire circulated by Upjohn's general counsel. Upjohn refused to produce the documents on the ground that they were protected against discovery by the attorney-client privilege and by the work product doctrine.

**Proceedings Below**

The IRS thereupon instituted a proceeding to enforce the summons in the United States District Court for the Western District of Michigan. The Magistrate to whom the matter was referred recommended enforcement of the summons.

The Magistrate rejected Upjohn's claim of attorney-client privilege, concluding that the attorney-client privilege protects only communications made to counsel by members of Upjohn's "control group" and finding that the employees from whom Upjohn's attorneys had obtained the information at issue were not members of the "control group." 41 A.F.T.R.2d at 78-799 to 78-803.

The Magistrate rejected also Upjohn's work product objection. Concluding that the IRS had made a sufficient showing of need for the material sought by the summons, the Magistrate found it unnecessary to decide whether the work product doctrine was applicable in a summons enforcement proceeding.[2] 41 A.F.T.R.2d at 78-803 to 78-805.

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2 The Magistrate's opinion did not discuss whether the documents at issue were prepared in anticipation of litigation. This almost surely was so, however, in light of the extensive litigation spawned in recent years by questionable payments. *See generally* Block and Barton, *Administrative Proceedings to Enforce the Foreign Corrupt Practices Act*, 7 Sec. Reg. L. J. 40 (1979), and cases cited therein.

The District Court did not make a separate analysis of the issues, but simply adopted the opinion of the Magistrate in a brief order. 78-1 U.S.T.C. ¶ 9437. Upjohn appealed.

The Court of Appeals for the Sixth Circuit recognized that other courts, including the Seventh and Eighth Circuits, had adopted a broader rule—the "subject matter" test—than the one applied by the District Court in determining the scope of the attorney-client privilege with respect to communications with corporate personnel. The Court further acknowledged that under this "subject matter" test, communications made to counsel by corporate employees are privileged if, (a) the subject matter of the communications is a matter about which counsel has been requested to provide legal advice, (b) it involves the performance by the employees of their corporate duties, and (c) the employees' superiors directed them to communicate with counsel 600 F.2d at 1226-27.

The Court of Appeals nevertheless held that the narrower "control group" test was the proper standard. *Id.* The Court further held that, although the District Court had properly looked to the "control group" test to define the scope of the attorney-client privilege, it had misapplied the test. 600 F.2d at 1227-28. Consequently, the Court of Appeals remanded the case to the District Court for a redetermination of which of the employees from whom Upjohn's attorneys received communications were part of Upjohn's "control group." *Id.* at 1228.

With respect to the work product issue, the Sixth Circuit held in a cursory footnote that the work product doctrine was not applicable to administrative sum-

monses issued under 26 U.S.C. § 7602. *Id.* at 1228 n. 13.

## INTEREST OF AMICI CURIAE

The scope of the attorney-client privilege as applied to corporations has an enormous impact both on the relationship between counsel and their corporate clients and on the administration of justice. The Committees submit that acceptance of the "control group" test adopted by the Court of Appeals in this case would substantially and adversely affect both those weighty interests.

The scope of the work product doctrine also is of great significance to the bar. The Committees submit that the result below, if affirmed, necessarily would have the very "demoralizing . . . effect" that the doctrine was designed to avoid.[3]

Petitioners and respondents naturally must focus on the particular facts of this case. The Committees' interest is more in emphasizing the broader significance of the questions raised and in presenting the policy considerations that, we submit, should be determinative of those issues.

## SUMMARY OF ARGUMENT

The Court of Appeals perceived this case as presenting a conflict between the IRS's interest in discovering relevant information and society's interest in protecting the confidential relationship between a lawyer and his client. The Court regarded the attorney-

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3 *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947).

client privilege and the work product doctrine as obstacles to a determination of the truth and therefore limited each to the narrowest possible scope. We submit that the Court of Appeals' view is based on a fundamental misconception and led the Court to an improperly restrictive view of legal principles that serve important social interests.

The attorney-client privilege protects only communications between the lawyer and his client. It does not prevent the discovery of the underlying facts. Nor does the work product doctrine interfere with ascertaining the truth. An attorney's opinions and mental operations simply are not a proper subject of IRS interest, and factual work product material may be obtained on a proper showing of need. In this case, for example, nothing prevents the IRS from determining all of the relevant facts and circumstances concerning questionable payments by Upjohn. The IRS, either by voluntary means or otherwise, may interview Upjohn's employees and inspect Upjohn's business records. In consequence, there is little reason to restrict the attorney-client privilege and the work product doctrine as the Court below has done.

We do not here focus only on the weakness of the interests advanced by respondents, however. Nor do we dwell on the fact that the "control group" test (which finds no support in the entire history of the common law) was invented in *dictum* only eighteen years ago[4]

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4 *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3rd Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). In that case, a defendant invoked the attorney-client privilege in response to interrogatories that

(*Footnote continued*)

and has been rejected both by the courts that have properly analyzed the issue[5] and by most of the commentators.[6]

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(*Footnote continued*)

merely asked for certain relevant facts within the knowledge of the corporation. The District Court overruled the objection on the ground that the employees in question were not within the corporation's "control group." It cited no authority for so restricting the privilege and made no effort to justify the restriction on policy grounds. Moreover, because the interrogatories sought only the underlying facts, the Court's "control group" statement was gratuitous. No proper formulation of the attorney-client privilege protects against disclosure of relevant facts, as opposed to confidential communications.

5 *E.g.*, *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1978) (*en banc*); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by equally divided Court*, 400 U.S. 348 (1971); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D. D.C. 1978); *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974); *Xerox Corp.* v. *IBM Corp.*, 64 F.R.D. 367 (S.D.N.Y. 1974); *Sylgab Steel & Wire Corp.* v. *Imoco-Gateway Corp.*, 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976); *Eutectic Corp.* v. *Metco, Inc.*, 61 F.R.D. 35 (E.D.N.Y. 1973); *Hasso* v. *Retail Credit Co.*, 58 F.R.D. 425 (E.D. Pa. 1973). It is noteworthy that the District Court for the Eastern District of Pennsylvania, the court which invented the "control group" test, is among the courts which, upon consideration, have rejected it.

6 *E.g.*, Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 Bus. Lwyr. 901, 907-08 (1969); Heininger, *The Attorney-Client Privilege as It Relates to Corporations*, 53 Ill. B.J. 376, 384 (1965); Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 Ga.L.Rev. 339, 366-69 (1972); Maurer, *Privileged Communications and the Corporate Counsel*, 28 Ala. Lwyr. 352 (1967); Pye, *The Attorney-Corporate Client Privilege*, 15 Prac. Lwyr. 15 (1969); Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. Indus. & Com. L. Rev. 873, 875-77 (1971); Note, *Corporate Attorney-Client Privilege: Diversified Industries, Inc. v. Meredith—The Modified Harper & Row Test*, 4 J. Corp. Law 226 (1978); Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 So. Calif. L. Rev. 303, 311-12 (1977); Note, *The Corporate Attorney-Client Privilege in the Federal Courts*, 22 Cath.

(*Footnote continued*)

What we do emphasize is that the "control group" test and the Court of Appeals' restrictive view of the work product doctrine, if adopted by this Court, would seriously compromise important public policies. Those public policies would be affected adversely because their implementation necessarily relies heavily upon the existence of an effective private bar possessing the trust of its corporate clients, the freedom to seek and record pertinent information, and the ability to perform its tasks uninhibited by the threat of forced disclosure. Were the bar yoked with the view adopted by the courts below, then that trust would be compromised and the bar would be unable adequately to perform this valuable public function.

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(*Footnote continued*)

Lwyr. 138, 146-50 (1976); Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 Syr. L. Rev. 759, 761-62 (1971); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 Mich. L. Rev. 360, 373-74 (1970); Comment, *Attorney-Client Privilege—Diversified Industries, Inc. v. Meredith: New Rules for Applying the Privilege When the Client Is a Corporation*, 57 No. Car. L. Rev. 306 (1979); Comment, 47 Geo. Wash. L. Rev. 413 (1979); Comment, 28 Drake L. Rev. 191 (1978); Comment, 31 Vand. L. Rev. 667 (1978); Comment, *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation*, 39 Ford. L. Rev. 281, 291 (1970).

## ARGUMENT

### I.

### THE "SUBJECT MATTER" TEST BEST SERVES THE PURPOSE OF THE ATTORNEY-CLIENT PRIVILEGE AND THE INTERESTS OF SOCIETY.

#### A. The "Control Group" Test Would Impair the Important Role of Corporate Counsel in Securing Responsible Corporate Action.

This Court repeatedly has recognized that the attorney-client privilege is a bulwark in the proper administration of justice.

Over one hundred years ago, this Court emphasized that:

> "The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance." *Connecticut Mutual Life Insurance Co.* v. *Schaefer*, 94 U.S. 457, 458 (1876).

A decade later, this Court stated that the attorney-client privilege:

> ". . . is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which

> assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888).

Again, in 1915, this Court wrote:

> "The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States* v. *Louisville & Nashville R. R.*, 236 U.S. 318, 336 (1915).

More recently, Mr. Justice White wrote for the Court:

> "The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. . . . As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976).

This Court never has suggested that the salutary purposes of the attorney-client privilege are any less important when the client is a corporation than when it is a private individual. Indeed, the *Louisville & Nashville* case, *supra*, 236 U.S. 318, quoted above, involved a communication between a corporate client

and its lawyer. There is more reason today than ever before fully to protect communications between corporate personnel and corporate counsel.

First of all, today it is corporate clients, more often than individuals, who regularly call upon counsel for advice concerning how to comply with the law.[7] As Judge Medina has remarked:

> "Since [the] early statements [of the purposes of the privilege], the necessity of protecting the attorney-client relationship has become even more apparent; the legal rights and duties of large corporations and those who dispute with them would not be susceptible of judicial administration in the absence of lawyers, nor, in the absence of the privilege could lawyers properly represent their clients." *A.B. Dick Co.* v. *Marr*, 95 F. Supp. 83, 102 (S.D.N.Y. 1950), *appeal dismissed*, 197 F.2d 498 (2d Cir.), *cert. denied*, 344 U.S. 878 (1952).

This, of course, will come as no surprise to this Court, intimately familiar as it is with the maze of complex statutes and regulations that govern the modern corporation's every action.

Second, society today relies heavily upon the private bar to provide the frank advice necessary to steer corporate conduct in the proper direction. As Simon H. Rifkind has said:

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7 "[I]ndividuals go to lawyers when they are in trouble with the police, or are sued, or themselves want to bring a lawsuit. . . . Corporations, however . . . constantly go to lawyers to find out how to obey the law." Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 Bus. Lwyr. 901, 913 (1969).

"[A] very large area of regulation by law would today be impossible of enforcement were it not for the services of a highly sophisticated, well-informed and highly-principled Bar . . . .

"To be specific, I refer, first, to the Internal Revenue laws; secondly, to the Anti-Trust laws and, third, to the Securities and Investment laws, as examples. There are many more.[8] And I suggest that for every police action taken by agencies of the government in these fields, either to prevent or punish infractions, there are a thousand preventive steps which are taken at the instance of, on the advice of, and under the supervision of private lawyers.

"The reason is simple enough. Compliance with these laws and these regulations is not the mere activation of the 'do right' ethics that businessmen have learned at their mothers' knees. Nothing in the moral code learned at home teaches a business executive what reports he should file with the SEC, what deductions he may take in his tax return, what and when to disclose to the public about his corporate affairs, when to exercise control in management and when to abstain, what is permissible to say to a competitor and what is forbidden. If the police confined their activities to the enforcement of these regulations alone and abandoned all other forms of law enforcement, there would not be enough of them without the Bar." Rifkind, *Access to Client and Adversary—A Plea*, 22 Record of the Association of the Bar of the City of New York 566, 567-68 (1967).

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8 For example, the federal equal employment laws and other labor laws, the Occupational Safety and Health Act, the Clean Air Act and other environmental legislation, and fair trade practice laws and rules. As to each of these, corporate counsel plays a critical role in compliance programs.

Other commentators,[9] as well as senior enforcement officials[10] and the courts,[11] have recognized this link between a healthy attorney-corporate client relationship and the effective enforcement of these complicated but important federal laws.

In order for counsel to exercise their salutary influence on corporate conduct, they must have access to all relevant facts and the trust and confidence of their client and its personnel. As Judge Hemphill has said:

> "This court recognizes that it is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients. Unless

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9 *E.g.*, Burnham, *supra*, 24 Bus. Lwyr. at 913-14.

10 *E.g.*, Securities and Exchange Comm'n, *Report on Questionable and Illegal Corporate Payments and Practices* 67-68 (May 12, 1976); Address by Harold M. Williams, Chairman, Securities and Exchange Comm'n, *The Role of Inside Counsel in Corporate Accountability*, Seventeenth Annual Corporate Counsel Institute (Oct. 4, 1979), *reprinted in* 196 *Daily Report for Executives* (BNA) at B-1 (Oct. 10, 1979); Address by Harold M. Williams, Chairman, Securities and Exchange Comm'n, *Corporate Accountability*, Fifth Annual Securities Regulation Institute (Jan. 18, 1978); Address by Stanley Sporkin, Director, Division of Enforcement, Securities and Exchange Comm'n, Stamford, Conn. Area Commerce and Industry Ass'n Forum (Mar. 15, 1977); Address by Stanley Sporkin, Director, Division of Enforcement, Securities and Exchange Comm'n, New York County Lawyers Ass'n (April 7, 1976).

11 *E.g.*, *SEC* v. *Spectrum, Ltd.*, 489 F.2d 535, 536 (2d Cir. 1973) (Kaufman, C.J.) ("The securities laws provide a myriad of safeguards designed to protect the interests of the investing public. Effective implementation of these safeguards, however, depends in large measure on the members of the bar who serve in an advisory capacity to those engaged in securities transactions.")

> corporate personnel on a fairly low level can speak to attorneys in confidence, the enforcement of the federal antitrust laws is likely to be adversely affected." *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164-65 (D.S.C. 1974).[12]

This critical link between the lawyer-corporate client relationship and the administration of justice would be severely damaged were the attorney-client privilege limited to communications between counsel and a limited corporate "control group."

Consider, for a moment, the consequences that a breach of confidence would have upon day-to-day counseling at the lower levels of corporate management. Those who encounter difficulties with the antitrust laws, for example, are usually middle or lower management personnel who are involved in the marketing process. Prudent corporate management will provide for extensive counseling of these personnel by corporate attorneys. Under the "control group" test, however, the attorney-client privilege might not apply to discussions by counsel with these people. It no longer would be prudent for a corporation to have its lawyers carefully and regularly gather facts and give advice about its operations. Such counseling might be fatal in some unanticipated lawsuit. Consequently, corporations might well decide to forego that communication.

If, despite that risk, a corporation decided to continue such counseling, the counseling necessarily would be a pale version of its former self. On the one

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12 *Accord*, Rifkind, *Access to Client and Adversary—A Plea*, 22 Record of the Association of the Bar of the City of New York 566, 568 (1967).

hand, the sophisticated lawyer would not wish to learn too much for fear that some day he would have to disclose that information to his adversary.[13] On the other hand, the corporate employee would be inclined to stumble warily along, trying to ask questions that would enlighten him as to the law, while at the same time concealing from the lawyer any evidence of what the employee guessed might be violations of the law.

If, despite these obstacles, the lawyer did learn something significant, that significant new information probably would not be put to good use. The lawyer would be most reluctant to communicate his judgments as to the uncertain legality of conduct for fear that the employee might some day be forced to repeat the lawyer's words to his adversary, or before a court. Should the legality of the corporate conduct raise questions the answers to which were not obvious—a situation not unusual in the practice of corporate, securities or antitrust law—counsel's position would be particularly awkward. In that event, counsel's advice might be influenced by the risk that, at some future date, he would be called upon to defend the client in litigation, and his advice would be made public. One commentator has presented an illustration graphically explaining the problems that would be created if an attorney could not give his corporate client confidential advice about such issues:

> "In his role as advisor the lawyer may tell his client that the proposed [conduct] raises several questions not

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13 Consequently, it is not even accurate to say that the "control group" test would make facts marginally more accessible to the opposing party. Rather, that test would likely mean that counsel would not gather those facts in the first place.

> heretofore resolved, and that there is a distinct likelihood that [it] could ultimately be held to violate a federal statute or perhaps a previously entered order or decree. The corporation may nonetheless decide to undertake the program, and this may be a perfectly proper decision. If the matter is subsequently litigated . . . the lawyer, as an advocate, will be responsible for presenting the strongest possible case for the legality of the contested arrangement. But what of his prior advice? If not privileged it may be admissible evidence against the client, bearing on his state of mind or knowledge. Even if not admissible it may come to the attention of the [adversary, or the court, or the administrative] agency or its staff and influence [their] subsequent actions.
>
> "If the privilege is unavailable to his client the lawyer will be aware of these possibilities when he originally is called upon to render advice. What is he to do? His rendition of accurate but undesired advice will compromise the position that, as the advocate, he may be called upon to defend. In these circumstances it would be unrealistic to discount the likelihood that the advocate will prevail over the advisor. The resultant caution with which the lawyer advises his client may mislead the client into thinking his proposed action is lawful when in fact it is not, or may not be. It may induce him to undertake a program from which he would have been dissuaded had he been clearly warned of the legal dangers." Miller, *The Challenges to the Attorney-Client Privilege*, 49 Va. L. Rev. 262, 269-270 (1963).

It is also possible that counsel will skew his advice in the other direction. Counsel may be concerned with the consequences to himself of advising his client that there is little or no risk of illegality. If counsel gives such advice and if the risk materializes, then counsel's advice

can be portrayed by his adversary as foolish or even negligent. For this reason, counsel may be overly cautious in advising his corporate client, and thereby dissuade the client from economically and socially desirable activity.

These hypotheticals illustrate the obvious: frank advice will be given only if the lawyer is confident that his advice will be kept confidential.[14] Indeed, identical considerations explain the strict rules of confidentiality which apply to executive and judicial deliberations.

For all these reasons, a crippled privilege itself would cripple the bar's ability to counsel and guide corporate clients so as to avoid illegal conduct. The quantity of counseling would no doubt decline significantly. The quality of advice also would be undermined—both because counsel would not have adequate access to the pertinent facts and because counsel would shrink from providing frank advice. The public policies behind many significant federal laws would be undercut.

To be sure, respondents are not advocating the total abolition of the attorney-client privilege, only the adoption of the "control group" test. The "control group" test would leave some communications between counsel and corporate personnel protected.

But which communications would that test protect? Each time an attorney is asked for advice by a corporate client, he would have to ask that question. He would have to inquire into the position, status, and responsibility of the employee in question. He would

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14 Corporations might well be unwilling or unable to conduct the sort of investigation that Upjohn undertook here if they and their employees knew that the government could obtain the product of counsel's inquiry.

have to make a judgment as to whether a court, at some unknown later date, would conclude that the particular employee was a proper party to the amorphous process of his client's corporate decision-making with respect to the particular issue at hand. The resulting unpredictability would make it difficult if not impossible to achieve the objectives that the privilege is designed to achieve in connection with serving corporate clients.

Many commentators have recognized that the uncertainty caused by the "control group" test is one of the test's most serious drawbacks. *E.g.*, Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 Mich. L. Rev. 360, 373 (1970) ("This approach has failed to produce any objective guides that can be used to predict who the courts will consider to be members of the control group"). On the other hand, it is undisputed that the so-called "subject matter" test of the privilege establishes a "bright line" which is easy of application.

The unpredictability of the "control group" test is a product of several factors. A principal source of its vagueness arises from the amorphous nature of modern corporate decision-making. It is generally recognized today that there is no one "control group" in a corporation that is responsible for acting upon the advice of counsel. Corporations today are more often characterized by decentralized decision-making, or by decisions made after a lengthy process of receiving input from a range of corporate personnel. Consequently, it is no easy exercise to identify the fictive "control group." [15]

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15 *E.g.*, Smiddy, *Deciding*, in Top Management Handbook 267-68 n.1 (H.B. Maynard ed. 1980) (" 'Top Management' is a frequently used

(*Footnote continued*)

These uncertainties must have an adverse effect on the quality of legal advice rendered to corporations. Imagine a lawyer, perhaps pressed on an emergency basis for his advice, first embarking upon the metaphysical analysis of "patterns of decision making"—both his client's and the industry's—to determine whether some court, perhaps years later, will deem a particular employee to have been a member of a "control group."

To state the problem is to show the unworkability of the standard: unless counsel is speaking to the board or the chief executive officer, he must assume that his communications may not be protected. And this means that for most purposes the "control group" test would abolish the corporate privilege.

The vagueness of the "control group" test is a powerful reason to reject it. The *raison d'etre* of the attorney-client privilege, after all, is that the privilege encourages communications "which might not have been made absent the privilege." *Fisher* v. *United States*, *supra*, 425 U.S. at 403. But such communica-

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(*Footnote continued*)

phrase, and yet the frequency of its use, with so many different meanings, seems to have created considerable ambiguity . . . . There is *some*—but often diverse—meaning in it for everyone; yet this tends to limit its usefulness for serious discussion where both precision and consistency are needed.") (Emphasis in original). *See also* D. McFarland, *Management: Principles and Practices* 262 (1974); *Modern Management, Issues and Ideas* (D. Hampton ed. 1975); H. Simon, *The New Science of Management Decision* 39-44 (1960); V. Vroom, *A New Look At Managerial Decision Making*, in Organizational Dynamics-AMACOM (Spring 1973); H. Stieglitz & A. Janger, *Top Management Organization in Divisionalized Companies*, Conference Board, Studies in Personnel Policy No. 195, 3-4 (1965); H. Uyterhoeven, *General Managers in the Middle*, 50 Harv. Bus. Rev. 75 (March-April 1972).

tions simply will not occur if neither counsel nor the client can be sure, at the time of the communication, that the communication will be protected. In short, in an area of the law where predictability is peculiarly essential—where an unpredictable test of a privilege is as bad as no privilege at all—the "control group" test does not pass muster.[16]

The perversity of the "control group" test is further reflected by the fact that, as a corporation's legal problem becomes more serious, corporate attorneys under that test would be less able to obtain pertinent information and less able to assist their clients in complying with the law. A major government antitrust suit, for example, may be of such importance to a corporation that its board of directors will reserve the making of all relevant decisions to itself.[17] If so, only those directors might be members of the "control group." In that event, the privilege would be of little or no benefit to the corporation, for it is unlikely that the directors would have any personal knowledge of the pertinent facts.[18] Similarly, the Magistrate and the

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16 Accordingly, one of the reasons this Court should, we submit, reject the "control group" test is presumably one of the principal reasons this Court granted *certiorari*. Just as the uncertainty created by a split in the Circuit Courts of Appeals concerning the scope of the privilege substantially undermines the function of the privilege, so the uncertainty which would be created by the "control group" test would have the same baleful consequences.

17 *See, e.g., N. Y. Times*, July 20, 1979, § 4, at 2, col. 5, reporting that IBM constituted a committee composed of selected members of its board of directors to decide what action, if any, to take with respect to a recusal motion in the Government's antitrust case against it.

18 This would also be a terribly inefficient development. A small, artificial "control group" would be inundated with matters better left to others.

District Court in the instant case denied protection to communications from the managers of Upjohn's foreign affiliates because the questionable payments problem which those communications concerned was "a matter of overwhelming importance to the Company. . . ." 41 A.F.T.R.2d at 78-802.

To withdraw the privilege when it is most needed is in effect to conclude that the privilege has no good purpose. Yet, as this Court has recognized, the privilege is a bulwark in the proper administration of justice. For it to remain that bulwark, the "control group" test should be rejected.

**B. The "Control Group" Test is Based on an Artificial Effort to Personify the Corporation, an Effort that is Irrelevant to the Policies of the Privilege.**

The seminal "control group" case, *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962), explained the logic of the test as follows:

> "Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, *then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer* and the privilege would apply. In all other cases *the employee would be merely giving information to the lawyer to enable the latter to advise those in the*

> *corporation having the authority to act or refrain from acting on the advice.*" (Emphasis supplied).

This attempt to define the scope of the attorney-client privilege by personifying the corporation has remained to this day the rationale of the "control group" test.

The "personification approach" was followed by the Court of Appeals in this case. Thus, the court below wrote:

> "[C]orporations, unlike individuals, are organized in such a way that responsibilities, and the information needed to fulfill the responsibilities, are delegated and compartmentalized. Thus, marketing officials have knowledge and duties related only to selling, while plant supervisors have knowledge and duties related only to production. *It is only the senior management*, guiding and integrating the several operations *which can be said to possess an identity analogous to the corporation as a whole.*" *United States* v. *Upjohn Co.*, 600 F.2d at 1226 (6th Cir. 1979) (Emphasis supplied).

The logic of this approach fails even on its own terms.

As one commentator has explained:

> "[T]he courts that have utilized this approach appear to have overlooked the fact that the individuals in a corporation can be divided into two functional groups for purposes of the attorney-client privilege: *decision makers* and *givers of information*. In the context of the personal attorney-client privilege, the individual client acts in both capacities—he gives information and then, based on the attorney's advice, he makes a decision—and any communication either to or from his attorney is privileged. The control group approach concentrates on

> only those employees in the corporation who are decision makers and completely ignores the fact that information must be given to the attorney before he can render legal advice. [The "control group" test consequently] provides an incomplete analogy to the individual privilege." Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 Mich. L. Rev. 360, 374 (1970) (Emphasis in original).

More important, we submit, is the fact that the scope of the attorney-client privilege should not depend upon some metaphysical (and highly unpredictable) inquiry into who personifies a corporation. Rather, the proper scope of the privilege should be based upon an analysis of the function of the privilege.

The purpose of the attorney-client privilege is to ensure that frank and informed legal advice is sought and given in order that the client (be it individual or corporate) may conform his actions to the law. We respectfully submit that the decision of the courts below concerning the scope of the attorney-client privilege conflicts with this weighty purpose and, consequently, should be reversed.

## II.

## THE WORK PRODUCT DOCTRINE APPLIES TO THE ADMINISTRATIVE SUMMONS AT ISSUE HERE JUST AS IT APPLIES TO ANY COMPULSORY PROCESS.

In *Hickman* v. *Taylor*, 329 U.S. 495, 510-11 (1947), this Court recognized that the confidentiality of a lawyer's thoughts must be protected if the adversary system is to function.

The decision below—that the work product rule does not apply here because this is a proceeding in which the work product was sought by means of an administrative summons—is virtually unprecedented and is irreconcilable with the weighty policy considerations embodied in the *Hickman* decision. There is no hint in *Hickman* of any such exception, and there is no reason to create one now.

As this Court recognized in *Hickman*, a lawyer must have confidence that his thoughts will not become accessible to potential adversaries—no matter what proceedings those thoughts pertain to or what proceedings may be commenced in the future. If protection depends upon what type of a proceeding might someday be commenced, or upon the means by which work product might be demanded, then counsel will always labor with one eye over his shoulder. That is precisely the result which this Court has been at pains to avoid.

For these reasons, the courts have upheld the applicability of the work product rule in virtually every type of proceeding imaginable. Indeed, the courts have held that the work product rule is fully applicable, even in proceedings in which access to the facts is

particularly critical—such as criminal investigations and trials.

In *United States* v. *Nobles*, 422 U.S. 225, 238 (1975), for example, this Court held that the work product doctrine applied to a demand by the Government at a criminal trial for counsel's interview notes. The Court stated that the doctrine's "role in assuring the proper functioning of the criminal justice system is even more vital" than its role in civil proceedings. As it is now clear that the work product doctrine applies to both civil and criminal proceedings, surely there is no basis for any contention that it is inapplicable to a summons issued by an administrative agency.

It is noteworthy also that, as respondents conceded below, the summons at issue here is analogous to a grand jury subpoena. The same interests identified in Mr. Justice Jackson's opinion in *Hickman* v. *Taylor*, *supra*, have led each of the four United States Courts of Appeals that have considered the question to conclude that the work product doctrine is applicable to a grand jury subpoena. *See In re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Investigation*, 599 F.2d 1224 (3rd Cir. 1979); *In re Grand Jury Proceedings*, 604 F.2d 798 (3rd Cir. 1979); *Velsicol Chemical Corp.* v. *Parsons*, 561 F.2d 671 (7th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973).

In short, because the policy considerations identified in *Hickman* v. *Taylor* so far outweigh the slight costs of the work product privilege, that doctrine shelters work product in all contexts—whether it is demanded in a civil action, a criminal case, or in an administrative proceeding and regardless of the procedural means used to demand the work product.

For these reasons, we respectfully submit that this Court should make clear that footnote 13 in the opinion below is in error.

## CONCLUSION

For the policy reasons set forth above, both holdings of the decision below should be reversed.

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New York, New York

Respectfully submitted,

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